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IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO ANNOTATED

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Compiled Under the Supervision of the
Idaho Code Commission

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TITLE 18

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PUBLISHER'S NOTE

Since the publication in 1997 of Replacement Title 18, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for Title 18 has made it necessary to revise this volume. Accordingly, Replacement Title 18 are issued with the approval and under the direction of the Idaho Code Commission.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, court decisions are now being read as they are released by the courts. A consequence of this more current reading of cases, as they are posted on *lexis.com*, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com* as of March 25, 2004. These cases will be printed in the following reports:

Pacific Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Reporter, 3rd Series
United States Supreme Court Reports, Lawyers' Edition, 2nd Series

Additionally, annotations have been taken from the following sources:

American Law Reports, 5th Series, through Volume 113
American Law Reports, Federal Series, through Volume 189
Opinions of Attorney General, 2002-2

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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USER'S GUIDE

To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set.

ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law."

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

1921	March 5, 1921
1923	March 9, 1923
1925	March 5, 1925
1927	March 3, 1927
1929	March 7, 1929
1931	March 5, 1931
1931 (E.S.)	March 13, 1931
1933	March 1, 1933
1933 (E.S.)	June 22, 1933
1935	March 8, 1935
1935 (1st E.S.)*	March 20, 1935
1935 (2nd E.S.)	July 10, 1935
1935 (3rd E.S.)	July 31, 1936
1937	March 6, 1937
1937 (E.S.)	November 30, 1938
1939	March 2, 1939
1941	March 8, 1941
1943	February 28, 1943
1944 (1st E.S.)	March 1, 1944
1944 (2nd E.S.)	March 4, 1944
1945	March 9, 1945
1946 (1st E.S.)	March 7, 1946
1947	March 7, 1947
1949	March 4, 1949
1950 (E.S.)	February 25, 1950
1951	March 12, 1951
1952 (E.S.)	January 16, 1952
1953	March 6, 1953
1955	March 5, 1955

1957	March 16, 1957
1959	March 9, 1959
1961	March 2, 1961
1961 (1st E.S.)	August 4, 1961
1963	March 19, 1963
1964 (E.S.)	August 1, 1964
1965	March 18, 1965
1965 (1st E.S.)	March 25, 1965
1966 (2nd E.S.)	March 5, 1966
1966 (3rd E.S.)	March 17, 1966
1967	March 31, 1967
1967 (1st E.S.)	June 23, 1967
1968 (2nd E.S.)	February 9, 1968
1969	March 27, 1969
1970	March 7, 1970
1971	March 19, 1971
1971 (E.S.)	April 8, 1971
1972	March 25, 1972
1973	March 13, 1973
1974	March 30, 1974
1975	March 22, 1975
1976	March 19, 1976
1977	March 21, 1977
1978	March 18, 1978
1979	March 26, 1979
1980	March 31, 1980
1981	March 27, 1981
1981 (E.S.)	July 21, 1981
1982	March 24, 1982
1983	April 14, 1983
1983 (E.S.)	May 11, 1983
1984	March 31, 1984
1985	March 13, 1985
1986	March 28, 1986
1987	April 1, 1987
1988	March 31, 1988
1989	March 29, 1989
1990	March 30, 1990
1991	March 30, 1991
1992	April 3, 1992
1992 (E.S.)	July 28, 1992
1993	March 27, 1993
1994	April 1, 1994
1995	March 17, 1995
1996	March 15, 1996
1997	March 19, 1997
1998	March 23, 1998
1999	March 19, 1999

2000	April 5, 2000
2001	March 30, 2001
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CHAPTER 1

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18-100. Title, effect of prior law and statement of legislative intent. — (1) This title is called the Criminal Code.

(2) Except as provided in subsection (3) of this section, this code does not apply to offenses committed prior to its effective date [April 1, 1972] and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this code were not in force. For the purposes of this section, an offense was committed prior to the effective date of this code if any of the elements of the offense occurred prior thereto.

(3) In any case pending on or after the effective date of this code, involving an offense committed prior to such date:

(a) procedural provisions of this code shall govern, insofar as they are justly applicable and their application does not introduce confusion or delay;

(b) provisions of this code according a defense or mitigation shall apply, with the consent of the defendant;

(c) the court, with the consent of the defendant, may impose sentence under the provisions of this code applicable to the offense and the offender.

(4) The purpose of this code is to re-establish the criminal laws of the state of Idaho that existed on December 31, 1971, unless otherwise specifically amended or repealed by this act.

Any provision of law that was in effect on December 31, 1971, is not repealed by inference or implication by enactment of this code.

(5) Any reference to the Penal and Correctional Code in effect on and between January 1, 1972 and March 31, 1972 (Chapter 143, Session Laws of 1971) shall be deemed to refer to a comparable provision in this code. [I.C., § 18-100, as added by 1972, ch. 381, § 1, p. 1102.]

Compiler's notes. The words in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1972, ch. 381 is compiled as § 18-111A.

Section 21 of S.L. 1972, ch. 381 provided that the act should take effect April 1, 1972.

Cited in: State v. Barlow, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

Application.

Where defendant committed crime prior to enactment of this statute, it was within the trial court's discretion whether to apply the new law or the old. State v. Musquiz, 96 Idaho 105, 524 P.2d 1077 (1974).

18-101. Definition of terms. — The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

2. The words "neglect," "negligence," "negligent," and "negligently," import a want of such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

3. The word "corruptly," imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

4. The words "malice," and "maliciously," import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

5. The word "knowingly," imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

6. The word "bribe," signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote or opinion, in any public or official capacity.

7. Where the word "person" is used in this code to designate the party whose property may be the subject of any offense, it includes this state, any other state, any territory, government, or country, which may lawfully own property within this state, and all public and private corporations or joint associations, as well as individuals. [I.C., § 18-101, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6301; C.S., § 8074; I.C.A., § 17-101, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section com-

prising I.C., § 18-101, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as

the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Sec. to sec. ref. This section is referred to in § 66-612.

Cited in: *State v. Churchill*, 15 Idaho 645, 98 P. 853, 19 L.R.A. (n.s.) 835, 16 Ann. Cas. 947 (1909); *State v. Winter*, 24 Idaho 749, 135 P. 739 (1913); *Archbold v. Huntington*, 34 Idaho 558, 201 P. 1041 (1921); *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932); *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987); *State v. Gomez*, 126 Idaho 700, 889 P.2d 729 (Ct. App. 1995); *State v. Camp*, 134 Idaho 662, 8 P.3d 657 (Ct. App. 2000); *State v. Hammersley*, 134 Idaho 816, 10 P.3d 1285 (2000); *State v. Billings*, 137 Idaho 827, 54 P.3d 470 (Ct. App. 2002); *State v. Pole*, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

ANALYSIS

Instructions.

Malice.

Negligence.

Wilfulness.

Instructions.

In prosecution where defendant was found guilty of the crime of wilful concealment and the jury was instructed on the charged offense of petit theft and also on the lesser included offense of wilful concealment, these instructions adequately addressed the subject matter of the requested instruction on the statutory definition of negligence, as set forth in subdivision (2) of this section. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

Where defendant was found guilty of crime of wilful concealment, an explanation of the mental state, wilfulness, which is a requisite for guilt of the crime of wilful concealment, was given to the jury which was instructed that in order to find defendant guilty of wilful concealment they would have to find the state had proven beyond a reasonable doubt that defendant had wilfully concealed goods or merchandise belonging to store while still upon the premises of the store, and the jury was given a definition of "wilfully" which was drawn from the definition in subdivision (1) of this section. These instructions were all that were required for the statutory definition of negligence in subdivision (2) of this section, and subdivision (2) was not the law that governed defendant's guilt or innocence. There was no need for an instruction giving that definition of negligence to support her

defense that she did not act wilfully; her contention that she was merely negligent was properly a subject for closing argument, but did not necessitate a separate jury instruction. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

Malice.

Although the definition of malice as set forth in the former section was not applicable in a murder case, any error of such an instruction was rendered harmless where the jury was also fully instructed concerning the frame of mind required by § 18-4002. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Where it reasonably could be inferred from the evidence that the defendants knew they were committing a wrongful act, i.e., taking, without permission, property belonging to someone other than themselves, the drawing of such an inference properly would be within the province of the jury, not the court, in deciding whether, as a matter of fact, the conduct of the defendants was "malicious" under the trespass statutes and, by rendering verdicts of guilty, in light of the inferences which could be drawn from the evidence, the jury could, and did, find the element of malice was proven. *State v. Gissel*, 105 Idaho 287, 668 P.2d 1018 (Ct. App. 1983).

The question whether an act was committed with malice or whether a person was actuated by malice is ordinarily a question for the jury, as the triers of fact, to be determined in the light of all the surrounding facts and circumstances which tend to establish or dispute the existence of malice. *State v. Gissel*, 105 Idaho 287, 668 P.2d 1018 (Ct. App. 1983).

The definition of "malice" in subdivision (4) of this section leaves no room for an interpretation of the term to include negligence. *State v. Nastoff*, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

The use of "maliciously" to modify the verbs "injures or destroys," in § 18-7001, indicates that the act that must be performed with intent is the injuring or destroying of property; there is no implied legislative intent to create criminal liability under § 18-7001 where the injury to property was an unintended consequence of conduct that may have violated some other statute. *State v. Nastoff*, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

Negligence.

Instructions defining negligence in language of the statute were not erroneous. *State v. Brace*, 49 Idaho 580, 290 P. 722 (1930), overruled in part, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937). See also, *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939); *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

This section, read in connection with § 18-114, qualifies the definition of negligence, it being apparent from the context of the latter section that criminal negligence is not ordinary negligence as defined in this section. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Willfulness.

Instruction defining word “wilful” in words of this section is sufficient. *Meservy v. Idaho Irrigation Co.*, 37 Idaho 227, 217 P. 595 (1923).

The term “willfully waste”, as used in § 18-4309, imply the conscious commission of a wrong — the waste of irrigation water with intent and design that it be wasted and without lawful excuse. *State v. Hall*, 90 Idaho 478, 413 P.2d 685 (1966).

Although “willfulness” is not defined within the provisions of the Idaho Securities Act [§§ 30-1401 — 30-1458], since both the Idaho Securities Act and the criminal code relate to criminal prosecutions, the definition of

willfulness, as set forth in the criminal code, is applicable. *State v. Montgomery*, 135 Idaho 348, 17 P.3d 292 (2001).

The term “willfully,” when describing the mens rea necessary for a conviction under the “willfully permit” prong of § 18-1501(1), goes beyond the generalized provisions of this section and requires more than a purpose or willingness to commit the act or make the omission referred to. The state was required to show that defendant had knowledge of the consequences that his son would suffer “unjustifiable physical pain or mental suffering” as a result of his omission. *State v. Young*, 138 Idaho 370, 64 P.3d 296 (2002).

Where defendant picked his wife up and threw her to the floor, causing injury to her arm, the circumstantial evidence was sufficient to charge him with the crime of felony domestic battery; his intent to willfully inflict a traumatic injury to his wife could be inferred from his conduct. *State v. Reyes*, — Idaho —, 80 P.3d 1103 (Ct. App. 2003).

18-101A. Definitions. — As used in titles 18, 19 and 20, Idaho Code, and elsewhere in the Idaho Code, unless otherwise specifically provided or unless the context clearly indicates or requires otherwise, the following terms shall be defined as follows:

(1) “Correctional facility” means a facility for the confinement of prisoners. The term shall be construed to include references to terms including, but not limited to, “prison,” “state prison,” “state penitentiary,” “governmental detention facility,” “penal institution (facility),” “correctional institution,” “detention institution (facility),” “county jail,” “jail,” “private prison (facility)” or “private correctional facility.”

(2) “In-state prisoner” means [a] person who has been convicted of a crime in the state of Idaho and is either incarcerated or on parole for that crime or in custody for trial and sentencing, and who is being housed in any state, local or private correctional facility, or who is being transported in any manner within or through the state of Idaho.

(3) “Local correctional facility” means a facility for the confinement of prisoners operated by or under the control of a county or city. The term shall include references to “county jail,” or “jail.” The term shall also include a private correctional facility housing prisoners under the custody of the state board of correction, the county sheriff or other local law enforcement agency.

(4) “Out-of-state prisoner” or “out-of-state inmate” means a person who is convicted of and sentenced for a crime in a state other than the state of Idaho, or under the laws of the United States or other foreign jurisdiction, and who is being housed in any state, local or private correctional facility in the state of Idaho, or who is being transported in any manner within or through the state of Idaho.

(5) “Prisoner” means a person who has been convicted of a crime in the state of Idaho and is either incarcerated or on parole for that crime or in custody for trial and sentencing, or who is convicted of and sentenced for a crime in a state other than the state of Idaho, or under the laws of the

United States or other foreign jurisdiction, and who is being housed in any state, local or private correctional facility, or who is being transported in any manner within or through the state of Idaho. The term shall be construed to include references to terms including, but not limited to, “inmate,” “convict,” “detainee,” and other similar terms, and shall include “out-of-state prisoner” and “out-of-state inmate.”

(6) “Private correctional facility” or “private prison (facility)” means a correctional facility constructed or operated in the state of Idaho by a private prison contractor.

(7) “Private prison contractor” means any person, organization, partnership, joint venture, corporation or other business entity engaged in the site selection, design, design/building, acquisition, construction, construction/management, financing, maintenance, leasing, leasing/purchasing, management or operation of private correctional facilities or any combination of these services.

(8) “State correctional facility” means a facility for the confinement of prisoners, owned or operated by or under the control of the state of Idaho. The term shall include references to “state prison,” “state penitentiary” or “state penal institution (facility).” The term shall also include a private correctional facility housing prisoners under the custody of the board of correction. [I.C., § 18-101A, as added by 2000, ch. 272, § 1, p. 786.]

Compiler’s notes. The bracketed word “a” in subsection (2) was inserted by the compiler.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in §§ 18-2502, 18-2505, 18-2507, 18-2510, 18-6110, 31-3220A.

walls of such correctional facility,” because, although he had been charged with a felony, he had not yet been placed in a correctional facility when he emerged from the patrol car and fled. *State v. Shanks*, — Idaho —, 75 P.3d 206 (Ct. App. 2003).

“Prisoner.”

Trial court correctly dismissed a charge of escape where defendant was not “outside the

18-101B. Criminal laws applicable to out-of-state prisoners and personnel of private correctional facilities. — (1) An out-of-state prisoner and personnel of a private prison contractor employed at a private correctional facility in the state of Idaho shall be subject to all criminal laws of the state of Idaho.

(2) Any offense which would be a criminal act if committed by an in-state prisoner housed in a state, local or private correctional facility, or in custody during transport within or through the state of Idaho, including escape from such facility or during transport, and any penalty for such offense, shall apply in all respects to an out-of-state prisoner.

(3) Any offense which would be a criminal act if committed by an officer, employee or agent of a state or local correctional facility, and any penalty for such offense, shall apply in all respects to the officers, employees and agents of a private correctional facility located in the state of Idaho. [I.C., § 18-101B, as added by 2000, ch. 272, § 2, p. 786.]

Compiler’s notes. Section 3 of S.L. 2000, ch. 272, is compiled as § 18-915.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

18-102. Sufficiency of intent to defraud. — Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever. [I.C., § 18-102, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6302; C.S. § 8075; I.C.A., § 17-102, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-102, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

18-103. Civil remedies preserved. — The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same. [I.C., § 18-103, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6303; C.S., § 8076; I.C.A., § 17-103, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-103, as added by 1971, ch. 143, § 1. However, the latter section was

Instruction in Language of Section.

Instruction in the language of this section is sufficient. It is not necessary to name the injured person; the only effect of naming him in the information as the person intended to be defrauded is to confine the prosecution in its proof of intent to defraud to the particular person named. *State v. McDermott*, 52 Idaho 602, 17 P.2d 343 (1932).

Collateral References. 37 C.J.S., Fraud, § 157.

repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

18-104. Proceedings to remove officers preserved. — The omission to specify or affirm in this code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to remove, depose, or suspend any public officer, or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such removal, deposition, or suspension. [I.C., § 18-104, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6304; C.S., § 8077; I.C.A., § 17-104, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-104, as added by 1971, ch. 143, § 1. However, the latter section was

repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

18-105. Courts may punish for contempt. — This code does not affect any power conferred by law upon any public body, tribunal or officer,

to impose or inflict punishment for a contempt. [I.C., § 18-105, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6305; C.S., § 8078; I.C.A., § 17-105, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-105, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

18-106. Court to impose punishment. — The several sections of this code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed. [I.C., § 18-106, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6306; C.S., § 8079; I.C.A., § 17-106, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-106, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

ANALYSIS

Instructions.
Partial repeal.

18-107. Determination of punishment by court. — Whenever, in this code, the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case, must be determined by the court authorized to pass sentence within such limits as may be prescribed by this code. [I.C., § 18-107, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6307; C.S., § 8080; I.C.A., § 17-107, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-107, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective

Cross ref. Contempts in civil proceeding, §§ 7-601 — 7-614.

Contempts in criminal proceedings, § 18-1801.

Contempts punishable as criminal acts, § 18-302.

Inherent Power.

Inherent power of court to punish for contempt cannot be interfered with or abridged by legislature, at least so far as courts of record are concerned. *McDougall v. Sheridan*, 23 Idaho 191, 128 P. 954 (1913).

Instructions.

In involuntary manslaughter proceeding where jury at its own request was brought into presence of court and parties and asked the court if it was required to recommend punishment of defendant, and court said that was the duty of the court, it was not error for court to fail to instruct jury on matter of included offenses. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Partial Repeal.

This section, in so far as inconsistent with § 19-2513, providing indeterminate sentences in certain cases, is impliedly repealed. In *re Erickson*, 44 Idaho 713, 260 P. 160 (1927), overruled on other grounds, *Spanton v. Clapp*, 78 Idaho 239, 299 P.2d 1105 (1956).

April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words "this code" refer to the penal code.

Cited in: *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

ANALYSIS

Measurement of term.
 Partial repeal.
 Sentence within limits.

Measurement of Term.

For the purpose of appellate review, the date of first parole eligibility is the benchmark for measuring the term of confinement imposed by an indeterminate sentence. *State v. Tisdale*, 107 Idaho 481, 690 P.2d 936 (Ct. App. 1984).

Partial Repeal.

This section in so far as inconsistent with § 19-2513, providing for indeterminate sen-

tences in certain cases, is impliedly repealed. In *re Erickson*, 44 Idaho 713, 260 P. 160 (1927), overruled on other grounds, *Spanton v. Clapp*, 78 Idaho 239, 299 P.2d 1105 (1956).

Sentence Within Limits.

A sentence within the statutory maximum will not be deemed excessive unless the defendant shows that under any reasonable view of the facts the term of confinement is longer than appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution. *State v. Tisdale*, 107 Idaho 481, 690 P.2d 936 (Ct. App. 1984).

18-108. Defendant's testimony may be used to prove perjury. [Repealed.]

Compiler's notes. Former § 18-108, which comprised I.C., § 18-108, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-108, which comprised R.S., R.C., & C.L., § 6308; C.S., § 8081; I.C.A., § 17-108, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

substituted therefor was a section comprising I.C., § 18-108, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

18-109. Definition of crime. — A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office; or
5. Disqualification to hold and enjoy any office of honor, trust or profit in this state. [I.C., § 18-109, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 1; R.S., R.C., & C.L., § 6309; C.S., § 8082; I.C.A., § 17-109, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-109, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cited in: *State ex rel. Moore v. Bastian*, 97 Idaho 444, 546 P.2d 399 (1976); *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986); *State v. McCoy*, 128 Idaho 362, 913 P.2d 578 (1996).

ANALYSIS

Conviction before punishment.
 Statutory offenses.

Conviction Before Punishment.

Reading § 19-101 together with, this section, it is apparent that the legislature intended that neither death, imprisonment, fine nor removal or disqualification from office be imposed as punishment for a crime without there first being a legal conviction of that crime. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

Statutory Offenses.

Law creating statutory offense must define the acts necessary to constitute such offense with such certainty that a person may determine whether or not he has violated the law at the time he does the act which is charged to be a violation thereof. Accused must be informed what acts and conduct are prohibited and made punishable. *State v. Burns*, 53 Idaho 418, 23 P.2d 731 (1933).

18-110. Grades of crime. — Crimes are divided into:

1. Felonies; and
2. Misdemeanors. [I.C., § 18-110, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 2; R.S., R.C., & C.L., § 6310; C.S., § 8083; I.C.A., § 17-110, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-110, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Collateral References. Character of offense as felony as affected by discretion of court or jury regarding punishment. 95 A.L.R. 1115.

Character of offense as felony or misdemeanor for which a fine is provided as affected by provision for imprisonment until fine is satisfied. 127 A.L.R. 1286.

Reliance upon advice of counsel as affecting criminal responsibility. 135 A.L.R. 1055.

18-111. Felony, misdemeanor and infraction defined. — A felony is a crime which is punishable with death or by imprisonment in the state prison. An infraction is a civil public offense, not constituting a crime, which is punishable only by a penalty not exceeding one hundred dollars (\$100) and for which no period of incarceration may be imposed. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the state prison is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. [I.C., § 18-111, as added by 1972, ch. 336, § 1, p. 844; am. 1982, ch. 353, § 6, p. 874.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, §§ 3, 4; R.S., R.C., & C.L., § 6311; C.S., § 8084; I.C.A., § 17-111, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-111, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Sections 5 and 7 of S.L. 1982, ch. 353 are compiled as §§ 1-2208 and 18-113A, respectively.

Section 42 of S.L. 1982, ch. 353 as amended by § 2 of S.L. 1983, ch. 2 provided that this section should become effective July 1, 1983.

Cross ref. Punishment for infraction, § 18-113A.

Sec. to sec. ref. This section is referred to in §§ 18-8004C, 18-8005, 18-8006, 49-236, 67-7033, 67-7035 and 67-7129.

Cited in: State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974); State v. Thomas, 98 Idaho 623, 570 P.2d 860 (1977); Sparrow v. State, 102 Idaho 60, 625 P.2d 414 (1981); State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987); State v. McCoy, 128 Idaho 362, 913 P.2d 578 (1996).

ANALYSIS

Alternate sentences.
Character of offense.
Conviction of felony.
Designation in charge.
Designation in judgment.
Disbarment proceedings.
Imprisonment for fine.
Prosecutorial discretion.
Punishment.
Purpose.
Reduction of offense.

Alternate Sentences.

If a sentence is suspended or lessened, or other action taken by the court, after adjudging the defendant guilty, under § 19-2601, it is not an alternate sentence within the meaning of the former section. State v. O'Dell, 71 Idaho 64, 225 P.2d 1020 (1950).

Character of Offense.

The test to be applied as to whether a crime is a felony or misdemeanor, where no alternate sentence is provided by law, is the punishment that may or should be inflicted and not that actually imposed. State v. O'Dell, 71 Idaho 64, 225 P.2d 1020 (1950).

Conviction of Felony.

When the court, pursuant to plea of guilty or verdict of a jury, adjudges the defendant guilty of burglary, he has been convicted of a felony within the meaning of § 19-2514. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

Designation in Charge.

In a prosecution for poisoning animals, an indictment substantially in the words of the statute was sufficient to give the court jurisdiction and was not prejudicial, though the offense was designated as a misdemeanor instead of a felony. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

Designation in Judgment.

It is only when the law makes specific provision therefor, that the court may designate the crime to be a felony; and though so provided, absent such designation in the judgment, the crime shall be deemed a misdemeanor. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Disbarment Proceedings.

Expression "felony or misdemeanor involving moral turpitude," as used in the disbarment statute, means felonies and misdemeanors involving moral turpitude as defined by laws of this state, rather than by laws of other jurisdictions. In *re Dampier*, 46 Idaho 195, 267 P. 452 (1928).

Imprisonment for Fine.

Statute does not forbid incarceration in prison of felon sentenced either to pay fine or undergo imprisonment upon default of such payment. *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 P. 39 (1888).

Prosecutorial Discretion.

Where the facts legitimately invoke more than one statute, a prosecutor is vested with a wide range of discretion in deciding what crime to prosecute and this principle logically applies to a situation where the defendant's alleged conduct could be deemed in violation either of a misdemeanor statute or of a statute declaring the offense to be an infraction. *State v. Phillips*, 117 Idaho 23, 784 P.2d 353 (Ct. App. 1989).

Punishment.

Where the statute expressly provided that the punishment for a designated crime may be in the penitentiary or by fine or jail sentence, then the provisions of the former sec-

tion would have had application as to whether or not the particular offense was a felony or a misdemeanor, depending on the sentence imposed; but, where the statute provides that a crime be punishable by imprisonment in the state penitentiary with no alternate sentence, the punishment actually imposed is not controlling in determining whether the crime is a felony or a misdemeanor. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

Where a violation of a statute is punishable by imprisonment in the state penitentiary, the offense is classified as a felony albeit the punishment actually imposed may be of a lesser degree. *State v. Nagel*, 98 Idaho 129, 559 P.2d 308 (1977).

Purpose.

This section does not purport to define a word, but rather establishes a level of offense, distinguishing felonies from infractions and misdemeanors based upon the magnitude of the penalty which may be imposed. *State v. Swisher*, 125 Idaho 797, 874 P.2d 608 (Ct. App. 1994).

Reduction of Offense.

Where the statute defines the crime as a felony and provides no alternate sentence, the punishment actually imposed under the commutation provisions of § 19-2601 is inconsequential and does not reduce the offense from a felony to a misdemeanor because the mandatory punishment was lessened by reason of said section. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

Opinions of Attorney General. A person who is pardoned or who has successfully completed the period of a withheld judgment and had his or her guilty plea or conviction negated or expunged may possess and transact firearms without violating the federal Gun Control Act, 18 USCS § 921 et seq.; however, during the probationary period of a withheld judgment and during and after the term which a person serves on probation with a suspended sentence or on parole, such person is a convicted felon for the purposes of the Gun Control Act. OAG 86-16.

Collateral References. Character of offense as felony as affected by discretion of court or jury regarding punishment. 95 A.L.R. 1115.

Character of offense as felony or misdemeanor for which a fine is provided as affected by provision for imprisonment until fine is satisfied. 127 A.L.R. 1286.

18-111A. Felony defined further. — Wherever the words felony, felony in the first degree, felony in the second degree, or felony in the third degree are used in the entire Idaho Code as well as the 1972 Session Law amendments thereto, the same shall be defined as a felony and shall be punishable, unless otherwise provided in a specific act, according to the

General Felony Statute in the state of Idaho contained in section 18-112, Idaho Code. [I.C., § 18-111A, as added by 1972, ch. 381, § 2, p. 1102.]

Cited in: *State v. Nagel*, 98 Idaho 129, 559 P.2d 308 (1977); *State v. McCoy*, 128 Idaho 362, 913 P.2d 578 (1996).

18-111B. Misdemeanor defined further. — Wherever the words misdemeanor, petty misdemeanor or violation are used in the entire Idaho Code as well as the 1972 Session Law amendments thereto, these terms or any of them shall be construed to mean misdemeanor and shall be punished, unless otherwise provided for in a specific act, as provided under the General Misdemeanor Statute contained in section 18-113, Idaho Code. [I.C., § 18-111B, as added by 1972, ch. 381, § 3, p. 1102.]

Compiler's notes. Section 4 of S.L. 1972, ch. 381 is compiled as § 18-216.

Cited in: *State v. Nagel*, 98 Idaho 129, 559 P.2d 308 (1977).

18-112. Punishment for felony. — Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five (5) years, or by fine not exceeding fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-112, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 134, § 1, p. 307.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 151; R.S., R.C., & C.L., § 6312; C.S., § 8085; I.C.A., § 17-112, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-112, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Crimes for which no penalty is fixed punishable as misdemeanors, § 18-317. Imprisonment for fine, § 18-303.

Indeterminate sentence law, § 19-2513.

Punishment for common law crimes, § 18-303.

Sec. to sec. ref. This section is referred to in §§ 18-111A, 36-1402, 49-228, 49-236, 49-1418.

Cited in: *State v. Camp*, 107 Idaho 36, 684 P.2d 1013 (Ct. App. 1984); *State v. Briggs*, 113 Idaho 71, 741 P.2d 358 (Ct. App. 1987); *State v. Beebe*, 113 Idaho 977, 751 P.2d 673 (Ct. App. 1988); *State v. Hoffman*, 114 Idaho 139, 754 P.2d 452 (Ct. App. 1988); *State v. Hernandez*, 122 Idaho 227, 832 P.2d 1162 (Ct. App. 1992); *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996); *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000).

ANALYSIS

Application.

Attempted escape.

Construction.

Reasonable sentence.

Unreasonable sentence.

Application.

One convicted of furnishing intoxicating liquors to minors is properly sentenced under this section. *State v. Payton*, 45 Idaho 668, 264 P. 875 (1928); *State v. Stewart*, 46 Idaho 646, 270 P. 140 (1928).

Where appellant was convicted of a felony escape under § 18-2505 and receiving stolen property under § 18-4612 (repealed), the former section applied to both felonies, and appellant was subject to imprisonment for a period of up to five years on each count. *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969).

Because the legislature unambiguously denominated a violation of § 49-1404(2), eluding a peace officer, a felony and because it did not provide a specific prison term for that charge, the punishment set forth in this section, up to five years imprisonment and \$50,000 fine, is applicable and the penalty set forth in § 49-1404(3), license suspension, is in addition to that punishment. *State v. McCoy*, 128 Idaho 362, 913 P.2d 578 (1996).

Attempted Escape.

Two and one-half year, indeterminate sentences were within the maximum penalty authorized by statute for attempted escape and were not excessive as the term of additional confinement did not exceed the minimum period necessary to serve society's interest in deterring escapes. *State v. Urquhart*, 105 Idaho 92, 665 P.2d 1102 (Ct. App. 1983).

A unified sentence of 13 years in the custody of the Board of Corrections with a three year minimum period of confinement was not excessive for a conviction of felony escape with persistent violator enhancement, even though defendant had not been convicted of a violent crime and the county sheriff had testified as to improvement in defendant's conduct while in custody. *State v. Holton*, 120 Idaho 112, 813 P.2d 923 (Ct. App. 1991).

Construction.

This is not a maximum penalty statute but prescribes punishment for felonies only in cases where punishment is not prescribed by other sections of the statutes. In *re Miller*, 23 Idaho 403, 129 P. 1075 (1913).

Imprisonment imposed as alternative of fine has nothing to do with imprisonment for nonpayment of costs. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Reasonable Sentence.

Where the record indicated that the defendant had damaged his family, perhaps beyond

repair, and the trial court considered the likelihood of rehabilitation, the seriousness of the crime, the defendant's prior criminal record, and the fact that the defendant had consistently refused to admit the gravity of his offense or even acknowledge that he had sexually abused his three children, a ten-year indeterminate sentence for three counts of sexual abuse of a child under 16 was within the statutory maximum, and there was no abuse of discretion. *State v. Snapp*, 110 Idaho 269, 715 P.2d 939 (1986).

A fixed, five-year sentence on a sexual abuse charge and an indeterminate life sentence with a five-year minimum period of incarceration on a lewd conduct charge, which were to run concurrently, were not excessive nor an abuse of discretion, even though the court declined to follow the treatment recommendations of the evaluating psychologists. *State v. Bartlett*, 118 Idaho 722, 800 P.2d 118 (Ct. App. 1990).

Unreasonable Sentence.

Although defendant's sentence for possession of methamphetamine was reasonable, his fixed, five-year sentence for escape was excessive where the circumstances of defendant's escape were not aggravated or egregious. *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000).

Collateral References. Fine extending term of imprisonment beyond year does not convert offense into felony. 127 A.L.R. 1286.

18-112A. Fine authorized. — In addition to any other punishment prescribed for felonies in specific statutes of the Idaho Code, the court may also impose a fine of up to fifty thousand dollars (\$50,000). This section shall not apply if the specific felony statute provides for the imposition of a fine. [I.C., § 18-112A, as added by 1986, ch. 312, § 1, p. 763; am. 1994, ch. 134, § 2, p. 307.]

18-113. Punishment for misdemeanor. — (1) Except in cases where a different punishment is prescribed in this code, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding three hundred dollars (\$300), or by both.

(2) In addition to any other punishment prescribed for misdemeanors in specific statutes of the Idaho Code, the court may also impose a fine of up to three hundred dollars (\$300). This paragraph shall not apply if the specific misdemeanor statute provides for the imposition of a fine. [I.C., § 18-113, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 141, § 1, p. 315.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 151; R.S., R.C., & C.L., § 6313; C.S., § 8086; I.C.A., § 17-113, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted

therefor was a section comprising I.C., § 18-113, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Imprisonment for fine, § 18-303.

Public offense for which no penalty is otherwise prescribed is punishable as a misdemeanor, § 18-317.

Punishment for common law crimes, § 18-303.

Sec. to sec. ref. This section is referred to in §§ 18-111B, 39-804, 39-5303, 39-5310, 49-236, 50-1526 and 59-1327.

Cited in: *State v. Pontier*, 95 Idaho 707, 518 P.2d 969 (1974); *Stoneberg v. State*, 106 Idaho 519, 681 P.2d 994 (1984); *State v. Staten*, 114 Idaho 925, 762 P.2d 838 (Ct. App. 1988); *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

ANALYSIS

Construction.

Judgment.

18-113A. Punishment for infraction. — Every offense declared to be an infraction is punishable only by a penalty not exceeding one hundred dollars (\$100) and no imprisonment. [I.C., § 18-113A, as added by 1982, ch. 353, § 7, p. 874.]

Legislative Intent. Section 1 of S.L. 1982, ch. 353 read: "By the enactment of Chapter 223, Laws of 1981, the state made a dramatic move to reduce congestion in the court system, to improve the ability of peace officers to regulate and control motor vehicle traffic, and to achieve significant economies in the administration of justice. This chapter has not yet gone into effect, since it was deliberately enacted with an effective date clause of July 1, 1982. This was done to allow those officials concerned with the administration and enforcement of the law to have time to review and study its provisions.

"It has now come to our attention that some adjustments to Chapter 223 are in order, and that other equally vital changes need to be made in other sections of the law. It is the intent of this bill to provide a means to accomplish this. This bill repeals outright several sections of Chapter 223, in order that the Idaho Code provisions amended by such

Construction.

This section fixes the maximum penalty for a misdemeanor where it has not been otherwise fixed. *State v. Mulkey*, 6 Idaho 617, 59 P. 17 (1899); *In re Rowland*, 8 Idaho 595, 70 P. 610 (1902); *In re Burgess*, 12 Idaho 143, 84 P. 1059 (1906); *In re Miller*, 23 Idaho 403, 129 P. 1075 (1913).

Imprisonment imposed as alternative of fine has nothing to do with imprisonment for nonpayment of costs. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Judgment.

Where maximum sentence for conviction for drawing a check without funds was six months at the time the crime was committed, judgment placing defendant on probation for two years was excessive, but judgment of probation was valid for period of six months. *State v. Eikelberger*, 71 Idaho 282, 230 P.2d 696 (1951).

sections might be left in place; this bill repeals several sections of existing Idaho Code provisions; this bill replaces some of these repealed sections; and this bill adds new sections and makes several amendments in order to make the entire concept a viable instrument. And finally, this bill would delay the effective date of Chapter 223 from July 1, 1982 to March 1, 1983, so that all of the needed changes, revisions and amendments can function as an integrated whole."

Compiler's notes. Sections 6 and 8 of S.L. 1982, ch. 353 are compiled as §§ 18-111 and 19-1902, respectively.

Section 42 of S.L. 1982, ch. 353 as amended by § 2 of S.L. 1983, ch. 2 provided that this section should become effective July 1, 1983.

Cross ref. Infraction defined, § 18-111.

Sec. to sec. ref. This section is referred to in §§ 25-2803, 25-2805, 49-236, 67-4237, 67-7078 and 67-7115.

18-113B. Incarceration of juveniles for misdemeanor or felony offenses. — (1) Juveniles committing offenses which lie outside the scope of the juvenile corrections act, chapter 5, title 20, Idaho Code, and not charged under section 20-508 or 20-509, Idaho Code, may, in the discretion of a court or arresting officer, be placed in a juvenile detention facility or juvenile shelter care facility rather than in a county jail pending arraignment or trial, if arrested or held on bond. The option of placing a juvenile in

such a facility shall not affect the misdemeanor or felony status of the offense.

(2) Juveniles committing offenses which lie outside the scope of the juvenile corrections act, chapter 5, title 20, Idaho Code, and not charged under section 20-508 or 20-509, Idaho Code, may, in the discretion of the court, be sentenced:

(a) To serve time in a juvenile detention facility rather than in a county jail; or

(b) To serve time in a community sentencing alternative when a mandatory minimum period of incarceration is not required by statute.

The option of placing a juvenile in such a facility shall not affect the misdemeanor or felony status of the offense. [I.C., § 18-113B, as added by 1984, ch. 82, § 1, p. 157; am. 2004, ch. 23, § 2, p. 25.]

Compiler's notes. Sections 1 and 3 of S.L. 2004, ch. 23 are compiled as §§ 8-705 and 18-216, respectively.

18-114. Union of act and intent. — In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence. [I.C., § 18-114, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 1; R.S., R.C., & C.L., § 6314; C.S., § 8087; I.C.A., § 17-114, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Cochrane*, 51 Idaho 521, 6 P.2d 489 (1931); *State v. Kouni*, 58 Idaho 493, 76 P.2d 917 (1938); *State v. Perez*, 99 Idaho 181, 579 P.2d 127 (1978); *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988); *State v. Stiffler*, 114 Idaho 935, 763 P.2d 308 (Ct. App. 1988); *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220 (1990); *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994); *State v. Gonzalez*, 134 Idaho 907, 12 P.3d 382 (Ct. App. 2000); *State v. Crowe*, 135 Idaho 43, 13 P.3d 1256 (Ct. App. 2000); *State v. Hellickson*, 135 Idaho 742, 24 P.3d 59 (2001); *State v. Prather*, 135 Idaho 770, 25 P.3d 83 (2001).

ANALYSIS

Constitutionality.

Construction.

Defense of mistake of fact.

Driving under the influence.

Intent.

—Formulation.

—Instructions.

—Rape.

Jury instructions.

Liability of public officials.

Liquor offenses.

Mental condition.

Negligence.

Constitutionality.

Idaho Code § 18-705 and this section give fair warning to a person of common intelligence that defendant's conduct in swinging a crutch at a police officer was forbidden and subject to the penalty of law; therefore, § 18-705, as applied, was not constitutionally defective as void-for-vagueness. *State v. Dolsby*, 124 Idaho 271, 858 P.2d 810 (Ct. App. 1993).

Construction.

This section must be constructed as part of police regulations. *State v. Omaechevviaria*, 27 Idaho 797, 152 P. 280 (1915), aff'd, 246 U.S. 343, 38 S. Ct. 323, 62 L. Ed. 763 (1918); *State v. Bidegain*, 33 Idaho 66, 189 P. 242 (1920).

Wicked and wilful intent to violate criminal law is not essential element or ingredient in every criminal offense. This is so in statutory crimes where statute does not make intent ingredient of crime. *State v. Sterrett*, 35 Idaho 580, 207 P. 1071 (1922).

Whether criminal intent is necessary element of statutory offense is matter of construction to be determined by language of statute in view of its manifest purpose and design. *State v. Sterrett*, 35 Idaho 580, 207 P. 1071 (1922).

Conviction of involuntary manslaughter was authorized by evidence of the violation of four traffic statutes, namely, reckless driving, driving while intoxicated, at an excessive speed, and on the wrong side of the road.

State v. Salhus, 68 Idaho 75, 189 P.2d 372 (1948).

The allegations contained in the information of the commission of unlawful acts in violation of certain statutory law and ordinances could be regarded as allegations of fact out of which the reckless disregard and the negligence interpreted as reckless disregard arose which was the basis of the charge and though they could be characteristic of the charge of manslaughter, they could not have the effect of changing the charge from negligent homicide to manslaughter further because the proof thereof did not and could not increase the penalty beyond that fixed by the negligent homicide statute. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

The conflict between the involuntary manslaughter statute imposing a sentence of imprisonment not exceeding ten years in the state prison and the negligent homicide statute imposing a sentence of imprisonment not exceeding one year without designating the state prison or the county jail could not be reconciled, and that being so, the negligent homicide statute must govern since it was the later enactment. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

The information charging accused with failure to stop his motor vehicle at the scene of an accident and to render aid and furnish information after striking and injuring two persons, since it failed to charge knowledge on the part of accused which is an essential element of the offense, defined in former § 49-1001 (now repealed), was fatally defective, inasmuch as it failed to state facts sufficient to constitute a public offense. State v. Parish, 79 Idaho 75, 310 P.2d 1082 (1957).

Defense of Mistake of Fact.

In prosecution for lewd conduct with minor child under 16 where no evidence was introduced to raise the defense of lack of knowledge on defendant's part as to the victim's age, the trial court did not err in refusing to instruct the jury on the defense of mistake of fact. State v. Herr, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, State v. Tribe, 123 Idaho 721, 852 P.2d 87 (1993).

Driving Under the Influence.

Section 18-8006 merely requires a causal connection between defendant's driving under the influence and victim's injuries rather than requiring gross negligence of defendant pursuant to this section. State v. Johnson, 126 Idaho 892, 894 P.2d 125 (1995).

Intent.

Those entrusted with the care and safekeeping of public funds are held to strict accountability for the safeguarding of same and in compliance with the statutes governing the same. To sustain a conviction in a

criminal case more must be proven in connection with it than will justify recovery in a civil suit. Bonneville County v. Standard Accident Ins. Co., 57 Idaho 657, 67 P.2d 904 (1937); State v. Taylor, 59 Idaho 724, 87 P.2d 454 (1939).

On the question of intent the jury should be instructed that the intent mentioned in this section is not an intent to commit a crime but is merely the intent to knowingly perform the interdicted act, or by criminal negligence the failure to perform the required act, herein the act of receiving either actually or constructively and the act of knowingly or through criminal negligence not turning over the money involved herein, or knowingly or through criminal negligence failing to see that the money, though only constructively and not actually in appellant's possession, was turned over to the state treasurer in compliance with the statute. State v. Taylor, 59 Idaho 724, 87 P.2d 454 (1939).

Intent of defendant to do what jury found he did was sufficiently established by the commission of the acts and the surrounding circumstances. State v. Johnson, 74 Idaho 269, 261 P.2d 638 (1953); State v. Missenberger, 86 Idaho 321, 386 P.2d 559 (1963).

The word "intent" was construed to mean not an intent to commit a crime but was merely the intent to knowingly perform the interdicted act, or by criminal negligence the failure to perform the required act. State v. Parish, 79 Idaho 75, 310 P.2d 1082 (1957).

Wherever the motive, intention, or belief of an accused is relevant to the issue, it is competent for such person to testify directly upon that point; and if there is any reason to suspect his candor, the jury may make all the allowance called for by his position and demeanor; question of what accused believed and intended is one of the facts to be submitted to and determined by the jury. State v. Hopple, 83 Idaho 55, 357 P.2d 656 (1960).

In prosecution for larceny, the intent of defendant to steal was in issue and defendant should have been permitted to unfold and explain his actions and to state motives which he claimed prompted him. State v. Hopple, 83 Idaho 55, 357 P.2d 656 (1960).

The jury can infer from the facts surrounding the commission of the crime itself the general criminal knowledge and intent requisite for the commission of the crime as charged, the allegation of "knowingly" and "intentionally" having reference to the general criminal knowledge and intent and not to the specific intent and knowledge necessary to commit the crime of forgery. State v. Booton, 85 Idaho 51, 375 P.2d 536 (1962).

Where defendant had acted openly in informing his former employer that he would not return various tools in his possession

which belonged to employer until a wage dispute was settled, there was not sufficient evidence from which the jury could have concluded beyond reasonable doubt that defendant had a fraudulent criminal intent; therefore, the trial court erred in refusing to grant defendant's motion for judgment of acquittal. *State v. Gowin*, 97 Idaho 766, 554 P.2d 944 (1976).

Where evidence showed that a rancher purchased a mare and released it into his pasture and that another mare which was similar in size and appearance to his own apparently strayed into the pasture, and where the rancher sold the second mare when it became barren, he could not be convicted for grand larceny in the sale of such mare since the circumstantial evidence adduced was consistent with the rancher's assertion that sale was a mistake; thus, there was necessarily reasonable doubt as to the element of felonious intent. *State v. Anderson*, 102 Idaho 464, 631 P.2d 1223 (1981).

The use of "maliciously" to modify the verbs "injures or destroys," in § 18-7001 indicates that the act that must be performed with intent to injure or destroy property; there is no implied legislative intent to create criminal liability under § 18-7001 where the injury to property was an unintended consequence of conduct that may have violated some other statute. *State v. Nastoff*, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

—Formulation.

Where court instructed the jury that it could consider the fact of intoxication in determining whether defendant in passing check possessed the intention to defraud, it was not error for the court to refuse instruction of the defendant, that if the jury found the defendant was so intoxicated that he could not form an intent to defraud they should acquit the defendant, since jury was properly instructed as to effect of intoxication on intent to defraud. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

—Instructions.

Where question of criminal intent is raised by facts, it is error for court to refuse a requested instruction that if the jury believes defendant had no felonious intent to steal property at time he took it, he should be acquitted, although he subsequently conceived the intent to appropriate it. *State v. Hines*, 5 Idaho 789, 51 P. 984 (1898); *State v. Riggs*, 8 Idaho 630, 70 P. 947 (1902).

Where instructions considered as whole include element of intent to commit offense defined in statute they will be deemed sufficient. *State v. Ashby*, 40 Idaho 1, 230 P. 1013 (1924).

Refusal of trial court to instruct jury that intent must be proved beyond a reasonable

doubt by competent evidence was not error where court in other instructions quoted this section and § 18-115. *State v. Robinson*, 71 Idaho 290, 230 P.2d 693 (1951).

An instruction on criminal intent was not necessary in proceeding where defendant was charged with offense of involuntary manslaughter. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Instruction covering intent as set forth in § 18-115 was not erroneous merely because court included statement that "every person of sound mind is presumed to intend the natural and probable consequences of his act." *State v. Rutten*, 73 Idaho 25, 245 P.2d 778 (1952).

It was not error on the part of the court to give an instruction based upon § 18-115, it being the usual and customary instruction upon intent and the proof thereof. *State v. Gummerson*, 79 Idaho 30, 310 P.2d 362 (1957).

—Rape.

Where, in a prosecution for assault with intent to commit rape, defendant defended on the ground that by reason of drunkenness he was unable to entertain the required specific intent to commit an act of sexual intercourse with prosecutrix, the refusal of an instruction requested by defendant was not error where instructions given by the court adequately covered the requested instruction. *State v. Gailey*, 69 Idaho 146, 204 P.2d 254 (1949).

Jury Instructions.

A jury need not be instructed in the esoteric distinctions between general and specific intent, and where instructions to the jury repeatedly emphasized that before defendant could be convicted he must have acted with the intent to kill victim, the jury instructions, when read and considered as a whole, adequately instructed the jury concerning the elements of murder in the first and second degree and manslaughter, and the distinctions between each including intent. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

Because a jury instruction defined assault and battery pursuant to §§ 18-901 and 18-903 and identified the specific mental states required for commission of the crimes, there was no need for a further instruction based on § 18-114 to inform the jury of the required mental elements. *State v. Hoffman*, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

Liability of Public Officials.

A specific intent such as is necessary in embezzlement, larceny, making false report with intent to deceive, etc., is not an ingredient of an offense under this section requiring officials to account for public moneys. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

Liquor Offenses.

In order to sustain charge of unlawful possession of intoxicating liquor, where such possession is merely constructive, it must be shown that liquor was brought upon premises of accused or came into his actual or constructive possession with his knowledge or consent. *In re Baugh*, 30 Idaho 387, 164 P. 529 (1917); *State v. Johnson*, 39 Idaho 440, 227 P. 1052 (1924).

Intentional transportation of intoxicating liquor, without legal authority, is unlawful and good intentions or good faith of transporter is immaterial. *State v. Sterrett*, 35 Idaho 580, 207 P. 1071 (1922).

Mental Condition.

This section and §§ 18-115 and 18-207 are not in conflict, since this section and § 18-115 do not mandate the existence of a defense based upon insanity, but rather, § 18-207 reduces the question of mental condition from the status of a formal defense to that of an evidentiary question. Section 18-207 continues to recognize the basic common law premise that only responsible defendants may be convicted. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

This section prescribes a general requirement for the mental element of a crime; but the legislature may vary this requirement in defining a particular offense, subject to constitutional limits described below. The legislature has varied the requirement in § 18-4006(3)(c), and the two sections do not conflict. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

An individual must be found competent to stand trial. In addition, those individuals who are incapable of forming the necessary intent needed for the crime are protected by the mens rea requirements of this section and §§ 18-115 and 18-207. Finally, those "profoundly or severely retarded" individuals who do not fall under the first two protections and are convicted and who are "wholly lacking capacity to appreciate the wrongfulness of their actions" are protected by the sentencing provisions of § 19-2523. *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Negligence.

Instruction defining negligence in language of the statute held not erroneous. *State v. Brace*, 49 Idaho 580, 290 P. 722 (1930), overruled in part, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

The term "criminal negligence", as used in this section, means gross negligence, such as amounts to reckless disregard of consequences and the rights of others. *State v.*

McMahan, 57 Idaho 240, 65 P.2d 156 (1937).

The legislature did not intend every act done negligently, resulting in what would have been a crime if done intentionally, to be criminal because of the negligence but intended only to constitute such acts criminal in the event such negligence was such as manifested a reckless disregard of consequences and of the rights of others. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Statute defining involuntary manslaughter as an unlawful killing without malice, in the commission of a lawful act which might produce death, in an unlawful manner (§ 18-4006), must be read and construed with this section, requiring a union or joint operation of act and intent or criminal negligence. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

Criminal negligence may result from an omission to perform a duty, the commission of an act in violation of a duty or by a combination of both. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939).

The term criminal negligence as used in this section does not mean merely the failure to exercise ordinary care or that degree of care which an ordinarily prudent person would exercise. It means gross negligence, such as amounts to a reckless disregard of consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

Where truck driven by accused stopped because of engine trouble and accused was unsuccessful in his efforts to move the truck from the highway, accused was not guilty of "criminal negligence", which would justify a conviction for involuntary manslaughter, when an automobile crashed into the truck, resulting in the death of an occupant of the automobile. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

Where a charge in prosecution for involuntary manslaughter was given as to manslaughter in the perpetration of an unlawful act, namely, the violation of four traffic statutes, reckless driving, driving while intoxicated, at an excessive speed, and on the wrong side of road, the failure to charge on criminal negligence relative to manslaughter in the commission of a lawful act without due caution and circumspection was not prejudicial error. *State v. Salhus*, 68 Idaho 75, 189 P.2d 372 (1948).

Vehicular involuntary manslaughter under § 18-4006 is not subject to the restrictive interpretation of "criminal negligence" in this section, which has been interpreted to mean gross negligence; the legislature was free to create a separate, lesser category of crime for vehicular homicides lacking gross negligence. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

Where a jury specifically found that the defendant was grossly negligent in causing the death of a person in an automobile accident and the jury convicted the defendant of involuntary manslaughter, the defendant failed to show how his right to due process was infringed by his claim that § 18-4006

was void for vagueness insofar as it proscribed conduct without gross negligence, since the defendant was not charged with, nor was he convicted of, conduct lacking gross negligence. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

18-115. Manifestation of intent. — Intent or intention is manifested by the commission of the acts and surrounding circumstances connected with the offense. [I.C., § 18-115, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 1, p. 296.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 2, 3; R.S., R.C., & C.L., § 6315; C.S., § 8088; I.C.A., § 17-115; 1970, ch. 31, § 11, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 2 of S.L. 1994, ch. 131 is compiled as § 18-204.

Cited in: *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988); *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

ANALYSIS

Burglary.
Evidence.
Instructions on intent.
Intent.
—Generally. *
—Jury question.
—Rape.
Mental condition.

Burglary.

Having in mind the statutes pertaining to the offense under consideration and to proof of intent and those capable of committing crimes, it becomes clear that burglary is a crime *malum in se*, as differentiated from a crime *malum prohibitum*. *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

Evidence.

Evidence justified conviction of defendant, age 15, of acts of lewd and lascivious conduct on body of 13 year old girl, where the record showed that the defendant seized girl, choked her into unconsciousness, removed her clothing, and took indecent liberties with her, as against his contention that he was only motivated by curiosity to see her in the nude. *State v. Iverson*, 77 Idaho 103, 289 P.2d 603 (1955).

Where defendant had acted openly in informing his former employer that he would not return various tools in his possession

which belonged to employer until a wage dispute was settled, there was not sufficient evidence from which the jury could have concluded beyond a reasonable doubt that defendant had a fraudulent criminal intent; and, therefore, the trial court erred in refusing to grant defendant's motion for judgment of acquittal. *State v. Gowin*, 97 Idaho 766, 554 P.2d 944 (1976).

Where prosecutrix, age thirteen, met defendant, age thirty-one, at a movie, accompanied him to his home and later traveled with him to Montana, the evidence was sufficient to allow the jury to find the intent to keep or conceal prosecutrix from her parents and to sustain defendant's conviction for kidnapping in the second degree. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Direct evidence of intent is not required but can be shown by circumstantial evidence. Defendant's intent could be proved by his acts and conduct, and where district court found that defendant pocketed the store's cash with the intent to deprive the store of money, there was substantial evidence to support a finding of intent. *State v. Gums*, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995).

Intent may be inferred from the defendant's conduct or from circumstantial evidence. *State v. Reyes*, — Idaho —, 80 P.3d 1103 (Ct. App. 2003).

Where defendant picked his wife up and threw her to the floor, causing injury to her arm, the circumstantial evidence was sufficient to charge him with the crime of felony domestic battery; his intent to willfully inflict a traumatic injury to his wife could be inferred from his conduct. *State v. Reyes*, — Idaho —, 80 P.3d 1103 (Ct. App. 2003).

Instructions on Intent.

Refusal of trial court to instruct jury that intent must be proved beyond a reasonable doubt by competent evidence was not error where court in other instructions quoted § 18-114. *State v. Robinson*, 71 Idaho 290, 230 P.2d 693 (1951).

Instruction covering intent, as set forth in § 18-114, was not erroneous merely because court included statement that "every person of sound mind is presumed to intend the natural and probable consequences of his act." *State v. Rutten*, 73 Idaho 25, 245 P.2d 778 (1952).

In a prosecution for burglary in the first degree, it was error for the court to refuse to give the following requested instruction: "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime." *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

It was not error on the part of the court to give an instruction based upon § 18-114, it being the usual and customary instruction upon intent and the proof thereof. *State v. Gummerson*, 79 Idaho 30, 310 P.2d 362 (1957).

A jury need not be instructed in the esoteric distinctions between general and specific intent, and where instructions to the jury repeatedly emphasized that before defendant could be convicted he must have acted with the intent to kill victim, the jury instructions, when read and considered as a whole, adequately instructed the jury concerning the elements of murder in the first and second degree and manslaughter, and the distinctions between each including intent. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

Intent.

—Generally.

Intent of defendant to do what jury found he did is sufficiently established by the commission of the acts and the surrounding circumstances. *State v. Johnson*, 74 Idaho 269, 261 P.2d 638 (1953).

—Jury Question.

The jury can infer, from the facts surrounding the commission of the crime itself, the general criminal knowledge and intent requisite for the commission of the crime as charged: the allegation of "knowingly" and "intentionally" having reference to the general criminal knowledge and intent and not to the specific intent and knowledge necessary

to commit the crime of forgery. *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962).

In prosecution for lewd conduct with a minor, trial court did not err in denying defendant's motion for acquittal at the end of the state's evidence since, although state's witnesses testified that defendant was intoxicated on the day in question, the question of whether his intoxication so affected him that he could not have had the necessary intent to commit the offense was for the jury. *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983).

—Rape.

Although the jury found that defendant did not commit rape, there was substantial evidence from which the jury could have found that he intended to commit rape. *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991).

Mental Condition.

This section and §§ 18-114 and 18-207 are not in conflict, since § 18-114 and this section do not mandate the existence of a defense based upon insanity, but rather, § 18-207 reduces the question of mental condition from the status of a formal defense to that of an evidentiary question. Section 18-207 continues to recognize the basic common law premise that only responsible defendants may be convicted. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

An individual must be found competent to stand trial. In addition, those individuals who are incapable of forming the necessary intent needed for the crime are protected by the mens rea requirements of this section and §§ 18-114 and 18-207. Finally, those "profoundly or severely retarded" individuals who do not fall under the first two protections and are convicted and who are "wholly lacking capacity to appreciate the wrongfulness of their actions" are protected by the sentencing provisions of § 19-2523. *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

18-116. Intoxication no excuse for crime. — A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected or otherwise ingested the substance causing the condition. [I.C., § 18-116, as added by 1972, ch. 336, § 1, p. 844; am. 1997, ch. 53, § 1, p. 91.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 7; R.S., R.C., & C.L., § 6316; C.S., § 8089; I.C.A., § 17-116, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section was added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 39-310.

Cited in: State v. Cornwall, 95 Idaho 680, 518 P.2d 863 (1974); State v. Wolfe, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984); State v. Puga, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986); Wolfe v. State, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987).

ANALYSIS

Constitutionality.

Degree of intoxication.

Intent.

—Generally.

—Issue for jury.

—Instructions.

—Specific intent.

Instructions to jury.

Mitigating circumstances.

Murder.

State of mind.

Constitutionality.

This section does not violate the due process clause of the Fourteenth Amendment of the United States Constitution. State v. Ransom, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002).

Degree of Intoxication.

In a murder prosecution it appeared that the defendant must not have been so far intoxicated as would have precluded him from knowing the difference between right and wrong and being able to complete a social pattern. State v. Snowden, 79 Idaho 266, 313 P.2d 706 (1957).

Where the defendant presented the defense that he was incapable of forming the necessary intent, an element of the crime of burglary, it was a question for the trier of fact to determine whether defendant's intoxication or voluntary use of drugs reached that level. State v. Roles, 100 Idaho 12, 592 P.2d 68 (1979).

Intent.

—Generally.

Voluntary consumption of beer with any possible intoxication before shooting by the defendant did not make his act less criminal but may have been considered negating a particular purpose, motive, or intent. State v. Gomez, 94 Idaho 323, 487 P.2d 686 (1971).

—Issue for Jury.

Question as to whether alleged intoxication affected the defendant so that he could not

have the necessary intent to commit offense was for the jury. State v. Johnson, 74 Idaho 269, 261 P.2d 638 (1953).

In prosecution for lewd conduct with a minor, trial court did not err in denying defendant's motion for acquittal at the end of the state's evidence since, although state's witnesses testified that defendant was intoxicated on the day in question, the question of whether his intoxication so affected him that he could not have had the necessary intent to commit the offense was for the jury. State v. Gratiot, 104 Idaho 782, 663 P.2d 1084 (1983).

This section states that the issue of intoxication is for the determination of the jury, not for the court in a pretrial ruling, and only the jury could determine what weight to give the allegation that defendant was drunk on the morning of the incident involving the kidnapping and assault of a nine-year-old girl with the intent of committing a lewd and lascivious act. State v. Soto, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

Whether or not the defendant was too intoxicated to have a deliberate and premeditated intent to kill was for the jury to decide on the trial of the case, but could not preclude the binding of defendant over to the district court on preliminary hearing. Carey v. State, 91 Idaho 706, 429 P.2d 836 (1967).

—Instructions.

Where, in a prosecution for assault with intent to commit rape, defendant defended on the ground that by reason of drunkenness he was unable to entertain the required specific intent to commit an act of sexual intercourse with prosecutrix, the refusal of an instruction requested by defendant was not error where instructions given by the court adequately covered the requested instruction. State v. Gailey, 69 Idaho 146, 204 P.2d 254 (1949).

Where court instructed the jury that it could consider the fact of intoxication in determining whether defendant in passing check possessed the intention to defraud, it was not error for the court to refuse instruction of the defendant, that if the jury found the defendant was so intoxicated that he could not form an intent to defraud they should acquit the defendant, since jury was properly instructed as to effect of intoxication on intent to defraud. State v. Baldwin, 69 Idaho 459, 208 P.2d 161 (1949).

Where court instructed the jury that the intent to defraud is a necessary element of the crime of forgery, and that existence of that intent must be established by the state beyond a reasonable doubt, it was not error by the court to refuse instruction of the defendant to the effect that in every crime there must be a union of act and intent, since jury had been sufficiently instructed on element of intent in forgery. State v. Baldwin, 69 Idaho

459, 208 P.2d 161 (1949).

Instruction to the effect that in every crime, there must be a union of act and intent, or criminal negligence, is in the language of the statute, and generally should be given. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Refusal to give requested instructions of defendant which emphasized defense that by reason of intoxication he was incapable of forming the specific intent to commit burglary for which he was charged was not error where court's instruction was substantially in the language of the former section. *State v. Rutten*, 73 Idaho 25, 245 P.2d 778 (1952).

Rape, performed by overcoming the resistance of the victim by force or violence, is not a specific intent crime, thus defendant was not entitled to jury instruction that voluntary intoxication may negate an element of specific intent. *State v. Lopez*, 126 Idaho 831, 892 P.2d 898 (Ct. App. 1995).

—Specific Intent.

Where the evidence at trial demonstrated that defendant had the ability to carry on a conversation with a police officer, to make a telephone call, to create an excuse for returning to the wrecker, and to drive the truck for some 25 miles at an extreme speed, a reasonable juror could find that defendant was not so intoxicated that he was unable to form the specific intent necessary to commit the crimes. *State v. Tucker*, 123 Idaho 374, 848 P.2d 432 (Ct. App. 1993).

Instructions to Jury.

In prosecution for assault with intent to commit rape, court did not err in failing to give instruction that jury might consider intoxication in determining intent, where such instruction was not requested, although such instruction if given would have been proper. *State v. Smailes*, 51 Idaho 321, 5 P.2d 540 (1931).

Where it was defendant's defense that he was not accountable for his acts by reason of insanity produced by long continuous use of intoxicants, an instruction that settled insanity produced by long continued intoxication had the same effect as to legal responsibility for one's conduct as insanity produced by any other cause could not result in any prejudice especially where other instructions properly defined insanity as a defense to crime. *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961).

Where evidence introduced by defendant tended to show that he has used intoxicating liquor over a considerable period of time and also used it to some extent within a short time before the offense was committed, an instruction was proper to point out a distinction between a state of ordinary drunkenness and alcoholic insanity. *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961).

Where, in prosecution for second degree

murder and aggravated battery, the jury instructions required the jury to consider whether the defendant had become so intoxicated at the time of the shootings that he could not act with malice aforethought, the trial judge did not err in refusing to give further instructions concerning the effect of intoxication. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Although the trial court gave an instruction essentially stating the content of this section, and defendant argued that the lengthier instructions approved in *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986), should have been given, the intoxication instruction given adequately stated the law. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

Mitigating Circumstances.

While the ingestion of drugs or alcohol by a defendant prior to the murder is not sufficient in itself to raise a defense to a first-degree murder charge, any arguable impact of such substance abuse is a proper consideration in mitigation of punishment upon sentencing. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Murder.

Voluntary intoxication is no excuse for the commission of a felonious homicide, but it may be considered in determining existence or nonexistence of malice aforethought, which distinguishes "murder" from "voluntary manslaughter." *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941).

Evidence, that accused and deceased were personal friends, but drank intoxicating liquors in sufficient quantities to cause them to fight over the ownership of a part of a bottle of beer, so that the accused in the sudden quarrel and heat of passion, shot and killed the deceased, was sufficient to sustain a conviction for manslaughter. *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941).

In murder prosecution, voluntary intoxication affects intent but does not render the homicide excusable. *State v. Miller*, 65 Idaho 756, 154 P.2d 147 (1944).

State of Mind.

An act is not made less criminal because an individual is intoxicated when committing the act. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Because intent is an element of the crime of kidnapping in the second degree, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the intent with which the accused committed the act. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

In a prosecution of defendant for voluntary manslaughter, the trial court did not abuse its

discretion in determining that defendant was not entitled to expert testimony to show the effect of alcohol on defendant's mental state at the time of the offense. *State v. Ransom*, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 54, 55, 168-170.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 A.L.R.3d 1236.

When intoxication deemed involuntary so as to constitute a defense to criminal charge. 73 A.L.R.3d 195.

Adequacy of defense counsel's representation of criminal client-conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client-pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 A.L.R.5th 419.

CHAPTER 2

PERSONS LIABLE, PRINCIPALS AND ACCESSORIES

SECTION.

18-201. Persons capable of committing crimes.

18-202. Territorial jurisdiction over accused persons liable to punishment.

18-203. Classification of parties.

18-204. Principals defined.

18-205. Accessories defined.

18-206. Punishment of accessories.

18-207. Mental condition not a defense — Provision for treatment during incarceration — Reception of evidence — Notice and appointment of expert examiners.

18-208, 18-209. [Repealed.]

18-210. Lack of capacity to understand proceedings — Delay of trial.

SECTION.

18-211. Examination of defendant — Appointment of psychiatrists and licensed psychologists — Hospitalization — Report.

18-212. Determination of fitness of defendant to proceed — Suspension of proceeding and commitment of defendant — Postcommitment hearing.

18-213, 18-214. [Repealed.]

18-215. Admissibility of statements by examined person.

18-216. Criminal trial of juveniles barred — Exceptions — Jurisdictional hearing — Transfer of defendant to district court.

18-201. Persons capable of committing crimes. — All persons are capable of committing crimes, except those belonging to the following classes:

1. Persons who committed the act or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent.

2. Persons who committed the act charged without being conscious thereof.

3. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was not evil design, intention or culpable negligence.

4. Persons (unless the crime be punishable with death) who committed the act or made the omission charged, under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused. [I.C., § 18-201, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 4, 6, 8, 9; R.S., R.C., & C.L., § 6330; C.S., § 8090; I.C.A., § 17-201; 1970, ch. 31, § 12, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and substituted therefor was a section comprising I.C., § 18-201, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The words in parentheses so appeared in the law as enacted.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cited in: *State v. Carpenter*, 67 Idaho 277, 176 P.2d 919 (1947); *State v. Nelson*, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991); *State v. Tiffany*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 44 (Mar. 25, 2004).

ANALYSIS

Age.

Burglary.

Culpable negligence.

Excusable homicide.

Ignorance of fact.

Insanity.

Instructions.

Mistake of fact.

Threat or menace.

Age.

Although the mental age of 17-year-old defendant, charged with murder, and who was of low-normal intelligence, was under 14, the former section was not applicable to him, since the concept of "mental age" is unrelated to chronological age. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

"Mental age" is not to be considered as equivalent to "age." *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Burglary.

It was reversible error for the trial court to fail to give an instruction on intent where the crime involved was that of burglary which is a crime *malum in se*. *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

In a prosecution for burglary in the first degree, it was error for the court to refuse to give the following requested instruction: "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime." *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

Where the defendant presented the defense that he was incapable of forming the necessary intent, an element of the crime of burglary, it was a question for the trier of fact to determine whether defendant's intoxication or voluntary use of drugs reached that level. *State v. Roles*, 100 Idaho 12, 592 P.2d 68 (1979).

Culpable Negligence.

The reference to "culpable negligence" in this section is simply a reiteration of the

excusable homicide standard under § 18-4012. It does not preclude imposition of criminal responsibility for negligence under § 18-4006. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

Excusable Homicide.

The definition of excusable homicide in § 18-4012 is not inconsistent with involuntary manslaughter as defined in § 18-4006. *State v. Long*, 91 Idaho 436, 423 P.2d 858 (1967).

Ignorance of Fact.

To be guilty of resisting officer in the discharge of his duty, the person making the resistance must have had knowledge that person resisted was an officer and that he was engaged in the discharge of, or attempt to discharge, an official duty. *State v. Winter*, 24 Idaho 749, 135 P. 739 (1913).

Insanity.

Where defense of insanity is raised in prosecution for murder, the burden is on defendant to create a reasonable doubt as to his responsibility at time of homicide. *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903).

Instruction that to establish the defense it must be "clearly proven" that accused was insane is erroneous. *State v. Wetter*, 11 Idaho 433, 83 P. 341 (1905).

In a murder trial, an instruction that the law presumes mental capacity and responsibility, unless the fact is proved otherwise by a preponderance of evidence, was erroneous, as defendant has only the burden of creating a reasonable doubt as to his mental capacity at the time of the commission of the offense. *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941).

In a murder trial, an erroneous instruction placing on the defendant the burden of proving insanity by a preponderance of the evidence was prejudicial when defendant's evidence might have been sufficient to raise a reasonable doubt as to his sanity, but was insufficient to prove insanity, by a preponderance of the evidence, and other instructions correctly stating the law did not render this erroneous instruction harmless. *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941).

Refusal of defendant's requested instruction concerning criminal responsibility of one committing offense without being conscious thereof was not error, in prosecution for homicide, where court not only instructed the jury in the language of the statute but fully instructed regarding standard of accountability and that nothing be presumed or taken by implication against the defendant. *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964).

Instructions.

In a murder prosecution where defendant alleged that he had been coerced into aiding

the real murderer in disposing of the victim's remains, an instruction that he would have been a principal, although the word principal was not used, if he was present at and participated in assault on victim was not error where instruction was given that coercion could relieve defendant of criminal responsibility. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Mistake of Fact.

In prosecution for lewd conduct with a minor child under 16 where no evidence was introduced to raise the defense of lack of knowledge on defendant's part as to the victim's age, the trial court did not err in refusing to instruct the jury on the defense of mistake of fact. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

A reasonable mistake of fact will be a defense only for those persons charged with an offense that has criminal intent as an ingredient of the crime. *State v. Stiffler*, 114 Idaho 935, 763 P.2d 308 (Ct. App. 1988), aff'd, 117 Idaho 405, 788 P.2d 220 (1990).

The legislature, in codifying the crime of sexual battery of a minor child 16 or 17 years of age, § 18-1508A, intended to incorporate the immemorial tradition of the common law that a mistake of fact as to the complainant's age is no defense. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

Threat or Menace.

A "threat" is a declaration of an intention to injure another by the commission of an unlawful act; a "menace" is synonymous with "threat." *State v. Eastman*, 122 Idaho 87, 831 P.2d 555 (1992).

Where defendant was arrested for DUI and driving without privileges where she attempted to move a vehicle involved in an accident, and in which she had been a passenger, out of the intersection, there was no

evidence to support an instruction on "threats or menaces"; an assertion of justification or evidence of justification does not support a requested instruction of "threat or menace." *State v. Eastman*, 122 Idaho 87, 831 P.2d 555 (1992).

Where a defendant picked up a package at the airport that the police knew contained methamphetamine, action of the police officer who did not tell defendant that he was a police officer, in telling defendant that he knew what was inside the package and would call police unless she gave him a "pinch" of it, such substance was not delivered under duress for defendant failed to show how her life would be endangered if she had refused to deliver the illegal substance; therefore, trial judge did not err in denying defendant's motion to dismiss the delivery charge. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

Because defendant convicted of delivery of controlled substance did not show he sold cocaine under any type of threat, nor that he reasonably believed his life would be endangered if he refused to participate in the transaction, trial court's denial of requested instruction on the affirmative defense of duress was affirmed. *State v. Canelo*, 129 Idaho 386, 924 P.2d 1230 (Ct. App. 1996).

The trial evidence did not support a threats and menaces instruction to the jury where the only evidence of threats was testimony that the accomplice warned defendant, both before and after the murder, that if defendant told anyone about the incident, he would suffer bodily injury. These were threats to dissuade defendant from disclosure of the crimes, but there was no evidence of any threat to induce defendant's participation in the offenses. *State v. Eby*, 136 Idaho 534, 37 P.3d 625 (Ct. App. 2001).

Collateral References. 22 C.J.S., Criminal Law, §§ 96-113.

Participation in crime without criminal intent for purpose of apprehending real criminal. 120 A.L.R. 1506.

18-202. Territorial jurisdiction over accused persons liable to punishment. — The following persons are liable to punishment under the laws of this state:

1. All persons who commit, in whole or in part, any crime within this state.
2. All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state.
3. All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state and are afterwards found therein. [I.C., § 18-202, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6331; C.S., § 8091; I.C.A., § 17-202, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and substituted therefor was a section comprising I.C., § 18-202, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section was added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cited in: *In re Moyer*, 12 Idaho 250, 85 P. 897, 12 L.R.A. (n.s.) 227, 118 Am. St. R. 214 (1906).

ANALYSIS

Child custody interference.

Fraudulent draft honored outside of state.

Prosecutable act.

Purpose of section.

Result of crime.

Subject matter jurisdiction.

Child Custody Interference.

Where the second and third elements of the crime of child custody interference, the keeping or withholding and the deprivation of the custodial rights, occurred in Idaho, under this section and §§ 19-301 and 19-302, the state had jurisdiction over the crime. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Because the withholding of the child from the custodial parent in violation of a court order is no different than the withholding of support from a family in violation of a court order, the keeping or withholding occurs, for purposes of jurisdiction, where the defendant is required to return the child to the custodial parent. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Fraudulent Draft Honored Outside of State.

Where defendant, as agent for foreign corporation, executed a fictitious contract of sale of wool, and on the basis of such contract,

defendant's sight drafts were honored by the corporation, defendant was properly tried for obtaining money under false pretenses in the county where the sight draft was drawn and paid, and from which such contract was sent. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

Prosecutable Act.

Although the term "prosecutable act" contained in § 19-301 has not been defined by the legislature or by the Idaho Supreme Court, it would appear that, to be consistent with this section, "prosecutable act" means any essential element of the crime. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Purpose of Section.

By this section legislature intended to punish any person who should commit any portion of crime within state to same extent and manner as though all acts which constitute crime had been committed in state. *State v. Sheehan*, 33 Idaho 553, 196 P. 532 (1921).

Result of Crime.

Given the language in this section and § 19-301 requiring that the crime must occur "in whole or in part" within the state, or that some "prosecutable act" must have been committed within the state, the language in § 19-302 must be interpreted to mean that the result of the crime must be an essential element of the offense before the result can be construed to have been "consummated" within Idaho. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Subject Matter Jurisdiction.

An Idaho court will have subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs within Idaho. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

18-203. Classification of parties. — The parties to crimes are classified as:

1. Principals; and
2. Accessories. [I.C., § 18-203, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6341; C.S., § 8092; I.C.A., § 17-203, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-203, as added by 1971, ch.

143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

18-204. Principals defined. — All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, or who, by fraud, contrivance, or force, occasion the intoxication of

another for the purpose of causing him to commit any crime, or who, by threats, menaces, command or coercion, compel another to commit any crime, are principals in any crime so committed. [I.C., § 18-204, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 2, p. 296.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 5, 7, 10; R.S., R.C., & C.L., § 6342; C.S., § 8093; I.C.A., § 17-204, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-204, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 1 of S.L. 1994, ch. 131 is compiled as § 18-115.

Cross ref. Distinction between accessories before fact and principals abolished, § 19-1430.

Cited in: State v. Curtis, 30 Idaho 537, 165 P. 999 (1917); State v. Peters, 43 Idaho 564, 253 P. 842 (1927); State v. Wilson, 51 Idaho 659, 9 P.2d 497 (1932); State v. Farnsworth, 51 Idaho 768, 10 P.2d 295 (1932); State v. Sensenig, 95 Idaho 218, 506 P.2d 115 (1973); State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980); State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984); State v. Hoffman, 116 Idaho 480, 776 P.2d 1199 (Ct. App. 1989); State v. Weinmann, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992); State v. Medina, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996); State v. Page, 135 Idaho 214, 16 P.3d 890 (2000); State v. Butcher, 137 Idaho 125, 44 P.3d 1180 (Ct. App. 2002).

ANALYSIS

- Abolition of distinction.
- Accomplice.
- Aid and abet.
- Application.
- City ordinances.
- Continuous course of conduct.
- Evidence.
- Instructions.
- Prosecutorial misconduct.
- Venue.

Abolition of Distinction.

Evidence sustained verdict of guilty on charge of burglary, if evidence showed defendant was connected with burglary, as it was not necessary for state to prove that defendant himself entered building, since distinction between accessories and principals has been abolished by legislature. State v. Kleier, 69 Idaho 278, 206 P.2d 513 (1949).

Accomplice.

An accomplice is one of several principals in a criminal undertaking. State v. Gonzales, 92

Idaho 152, 438 P.2d 897 (1968); State v. Wilson, 93 Idaho 194, 457 P.2d 433 (1969).

The fact that a witness had an altercation with the allegedly murdered decedent shortly before he was shot, then immediately accompanied the defendant to his home to procure a rifle, accompanied the defendant back to the scene of the altercation, and sat in the car while the defendant shot the decedent, after which the witness left the scene with the defendant raised an issue as whether such witness was an accomplice. State v. Gonzales, 92 Idaho 152, 438 P.2d 897 (1968).

Aid and Abet.

To "aid and abet" means to assist, facilitate, promote, encourage, counsel, solicit or invite the commission of a crime. Howard v. Felton, 85 Idaho 286, 379 P.2d 414 (1963).

A person who participates in criminal activity only as an agent of law enforcement lacks the requisite criminal intent. State v. Perez, 99 Idaho 181, 579 P.2d 127 (1978).

Where evidence showed that informant and undercover officer who was wearing a hidden microphone, followed by another officer in an unmarked vehicle who tape recorded the conversations made in undercover officer's presence, picked up defendant who directed them to a certain house which defendant entered and from which he returned accompanied by a friend who sold the officer a white envelope containing a substance that was later identified as PCP, such evidence was more than sufficient to convict defendant of aiding and abetting in the delivery of a controlled substance. State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1983).

Aiding and abetting requires some proof that the accused either participated in or assisted, encouraged, solicited, or counseled the crime; mere knowledge of a crime and assent to or acquiescence in its commission does not give rise to accomplice liability and failure to disclose the occurrence of a crime to authorities is not sufficient to constitute aiding and abetting. State v. Randles, 117 Idaho 344, 787 P.2d 1152 (1990).

Where there was sufficient evidence to show that the defendant had the requisite intent to kill a human being and then acted in furtherance of that intent by encouraging another to carry through with the plan, convictions on two counts of attempted murder were affirmed. State v. Fabeny, 132 Idaho 917, 980 P.2d 581 (Ct. App. 1999).

Judgment of acquittal was reversed where the jury could reasonably have concluded that

defendant intended to promote or facilitate the commission of the offense by his accomplice when defendant, failing to shoot the victim on his own and undergoing a beating at the victim's hands, asked for help from his accomplice, whom he knew to be armed with a pistol. *State v. Gonzalez*, 134 Idaho 907, 12 P.3d 382 (Ct. App. 2000).

Evidence was sufficient to support jury's verdict of guilty of aiding and abetting trafficking in cocaine and aiding and abetting failure to affix illegal drug tax stamps where defendant arranged for the sale of cocaine to a confidential informant and accompanied him to the drug dealer's residence where the sale took place. *State v. Romero-Garcia*, — Idaho —, 75 P.3d 1209 (Ct. App. 2003).

Application.

One who aids, abets, or encourages another in transportation of intoxicating liquor into state is as guilty as principal, whether or not he was actually present and participating in act. *State v. Sheehan*, 33 Idaho 103, 190 P. 71 (1920).

Where party remained outside building as a look-out while accomplice entered with intention of committing larceny in furtherance of a common purpose, he was guilty of burglary as a principal, though he himself made no entry. *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

City Ordinances.

City ordinance making it unlawful for any person owning, leasing or occupying or in control of premises to permit the unlawful sale of liquor thereon is not in conflict with this section. *State v. Brunello*, 67 Idaho 242, 176 P.2d 212 (1946).

Continuous Course of Conduct.

Where in a prosecution of defendant for both conspiracy to deliver a controlled substance and for aiding and abetting the delivery of a controlled substance, the evidence showed that everything the defendant did to aid and abet the delivery of the cocaine he did also in furtherance of the conspiracy; thus his conduct was one continuous "act," and he could be convicted and sentenced of only one crime, not both. *State v. Gallatin*, 106 Idaho 564, 682 P.2d 105 (Ct. App. 1984).

Evidence.

Where evidence showed that defendants charged with robbery, attempted extortion from parties occupying a hotel room, attempted to get into the room, and followed up by taking money by force, jury was justified in assuming that defendants acted in concert. *State v. Robinson*, 71 Idaho 290, 230 P.2d 693 (1951).

Where defendant was connected with burglary, it was immaterial whether he himself actually entered premises burglarized in or-

der to be convicted as a principal for first degree burglary. *State v. Hewitt*, 73 Idaho 452, 254 P.2d 677 (1953).

In order to find a defendant guilty of aiding and abetting the failure to affix the required drug tax stamps, a jury is required to find that: (1) defendant knowingly participated in or assisted the drug dealer in the possession or distribution of cocaine; and (2) the necessary drug tax stamps had not been affixed. *State v. Romero-Garcia*, — Idaho —, 75 P.3d 1209 (Ct. App. 2003).

Instructions.

Instruction on distinction between accessories and principals was sustained by the facts in this case. *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932) (But see § 19-1430.).

Where evidence showed that defendant was connected with burglary, court did not err in instructing jury in language of statute that distinction between accessories and principals had been abolished. *State v. Kleier*, 69 Idaho 278, 206 P.2d 513 (1949).

Prosecutorial Misconduct.

There was no prosecutorial misconduct where prosecutor reiterated what the district court had already instructed, that the state bears the burden of proving every element beyond a reasonable doubt and that defendant has no obligation to present evidence; the prosecutor stated that criminal defendants had those and a number of other rights. *State v. Romero-Garcia*, — Idaho —, 75 P.3d 1209 (Ct. App. 2003).

Venue.

Evidence as to acts of appellant in aiding the loading of a steer into a truck after it had been killed, dressing the steer out, and transporting it to the South Fork Lodge, with intent to deprive the owner of his property, was sufficient to establish appellant as a principal; and, as principal, he could be tried in either the county in which the steer was stolen or that in which the Lodge was located. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

In a murder prosecution where defendant alleged that he had been coerced into aiding the real murderer in disposing of the victim's remains, an instruction that he would have been a principal, although the word principal was not used, if he had been present at and participated in assault on victim was not error where instruction was given that coercion could relieve defendant of criminal responsibility. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Collateral References. 22 C.J.S., Criminal Law, §§ 130-136, 143-148.

18-205. Accessories defined. — All persons are accessories who, having knowledge that a felony has been committed:

(1) Willfully withhold or conceal it from a peace officer, judge, magistrate, grand jury or trial jury; or

(2) Harbor and protect a person who committed such felony or who has been charged with or convicted thereof. [I.C., § 18-205, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 169, § 1, p. 300; am. 1994, ch. 131, § 3, p. 296; am. 2001, ch. 119, § 1, p. 413; am. 2003, ch. 217, § 1, p. 566.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 11; R.S., R.C., & C.L., § 6343; C.S., § 8094; I.C.A., § 17-205, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-205, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Cross ref. Accessories to misdemeanor, § 18-304.

Cited in: State v. Nolan, 31 Idaho 71, 169 P. 295 (1917); State v. Mason, 107 Idaho 706, 692 P.2d 350 (1984); State v. Randles, 117 Idaho 344, 787 P.2d 1152 (1990); State v. Barnes, 121 Idaho 634, 826 P.2d 1346 (Ct. App. 1992).

ANALYSIS

Knowledge requirement.
Sentence.

Knowledge Requirement.

The appropriate interpretation of § 18-205 regarding an accessory who harbored or pro-

tected a person charged with, or convicted of, a felony was that the knowledge requirement was met if the person had notice that the accused was charged with, or convicted of, a felony. State v. Teasley, 138 Idaho 113, 58 P.3d 97 (Ct. App. 2002).

Sentence.

Where defendant, who was with three others, allowed decedent to be beaten, humiliated and murdered; fired shots into the dead body; after a night of rest, returned to scene of the slaying and burned the body in a shallow grave; and never reported the crime to the authorities, five-year fixed sentence for conviction of accessory to murder was not cruel and unusual punishment. State v. Toney, 130 Idaho 858, 949 P.2d 1065 (Ct. App. 1997).

Collateral References. 22 C.J.S., Criminal Law, §§ 137-142.

18-206. Punishment of accessories. — Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding five (5) years, or by fine not exceeding fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-206, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 4, p. 296.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 11; R.S., R.C., & C.L., § 6344; C.S., § 8095; I.C.A., § 17-206, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-206, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 5 of S.L. 1994, ch. 131 is compiled as § 18-216.

Sentences.

In an appeal from convictions of grand theft under § 18-2403(4) and acting as an acces-

sory to grand theft pursuant to § 18-2403(4), the trial court's imposition of a four-year indeterminate sentence for the first count, under § 18-2408, and a concurrent two-year indeterminate sentence for the second count, pursuant to this section, was not unduly harsh where, although the defendant was only 18 years old, he had a record consisting of minor traffic violations and a possession of marijuana charge, and where the presentence report showed that the defendant was involved with marijuana and cocaine, that the defendant had sought to obtain \$500 from the rightful owners of stolen snowmobile for information leading to its return, had offered to sell a stolen snowmobile to a neighbor, and had engaged in a number of other criminal

activities. *State v. Mason*, 107 Idaho 706, 692 P.2d 350 (1984).

Collateral References. 22 C.J.S., Criminal Law, §§ 143-148.

18-207. Mental condition not a defense — Provision for treatment during incarceration — Reception of evidence — Notice and appointment of expert examiners. — (1) Mental condition shall not be a defense to any charge of criminal conduct.

(2) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in an appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility which provides for incarceration or less restrictive confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.

(3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence.

(4) No court shall, over the objection of any party, receive the evidence of any expert witness on any issue of mental condition, or permit such evidence to be placed before a jury, unless such evidence is fully subject to the adversarial process in at least the following particulars:

(a) Notice must be given at least ninety (90) days in advance of trial, or such other period as justice may require, that a party intends to raise any issue of mental condition and to call expert witnesses concerning such issue, failing which such witness shall not be permitted to testify until such time as the opposing party has a complete opportunity to consider the substance of such testimony and prepare for rebuttal through such opposing expert(s) as the party may choose.

(b) A party who expects to call an expert witness to testify on an issue of mental condition must, on a schedule to be set by the court, furnish to the opposing party a written synopsis of the findings of such expert, or a copy of a written report. The court may authorize the taking of depositions to inquire further into the substance of such reports or synopses.

(c) Raising an issue of mental condition in a criminal proceeding shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject and, upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental condition may be in issue.

(d) The court is authorized to appoint at least one (1) expert at public expense upon a showing by an indigent defendant that there is a need to inquire into questions of the defendant's mental condition. The costs of examination shall be paid by the defendant if he is financially able. The

determination of ability to pay shall be made in accordance with chapter 8, title 19, Idaho Code.

(e) If an examination cannot be conducted by reason of the unwillingness of the defendant to cooperate, the examiner shall so advise the court in writing. In such cases the court may deny the party refusing to cooperate the right to present evidence in support of a mental status claim unless the interest of justice requires otherwise and shall instruct the jury that it may consider the party's lack of cooperation for its effect on the credibility of the party's mental status claim. [I.C., § 18-207, as added by 1982, ch. 368, § 2, p. 919; am. 1996, ch. 225, § 1, p. 736.]

Compiler's notes. Former § 18-207 (I.C., § 18-207, as added by 1972, ch. 336, § 1, p. 844) was repealed by S.L. 1982, ch. 368, § 1, effective July 1, 1982.

Section 1 of S.L. 1982, ch. 368 contained repeals; section 3 is compiled as § 18-211.

Section 2 of S.L. 1996, ch. 225 is compiled as § 18-211.

Cross ref. Consideration of mental illness in sentencing, § 19-2523.

Examination of defendant for evidence of mental condition, § 19-2522.

Cited in: *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983); *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983); *Barrows v. State*, 106 Idaho 901, 684 P.2d 303 (1984); *State v. Searcy*, 120 Idaho 882, 820 P.2d 1239 (Ct. App. 1991); *State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998); *State v. Tiffany*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 44 (Mar. 25, 2004).

ANALYSIS

Burden of proving intent.

Constitutionality.

Expert evidence.

Instructions.

Lacking capacity.

Mental condition as evidentiary question.

No justiciable controversy in record.

Psychological evaluation not compelled.

Sentence.

Burden of Proving Intent.

This section does not relieve the state of the burden of proving every fact necessary to constitute the crime charged beyond a reasonable doubt; it does not operate as a presumption that no defendant can possess such lack of mental capacity as to be unable to formulate criminal intent. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

Although eliminating affirmative defenses based upon the defendant's mental condition, this section does not relieve the state of its burden of proving beyond a reasonable doubt every fact necessary to constitute the crime

charged; in every crime or public offense there still must exist either a union of act and intent, or criminal negligence. *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

This section does not remove the element of criminal responsibility for the crime. The prosecution is still required to prove beyond a reasonable doubt that a defendant had the mental capacity to form the necessary intent. *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

While a defendant's mental condition has been expressly eliminated as a defense under subsection (1) of this section, the defendant may still use expert evidence on the issue of the defendant's state of mind where it is an element of the offense and such evidence is subject to the rules of evidence. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Constitutionality.

This section, which has eliminated mental condition as a defense but which does not prevent a defendant from presenting relevant evidence on the issues of mens rea or any state of mind which is an element of the offense, did not deprive the defendant of his federal constitutional rights under the eighth and fourteenth amendments where the defendant did not establish either that he was denied an opportunity to present evidence of mental condition in an attempt to negate criminal intent or that he offered such evidence and had it ruled inadmissible by the trial court. *Potter v. State*, 114 Idaho 612, 759 P.2d 903 (Ct. App. 1988).

Due process as expressed in the Constitution of the United States and of Idaho does not mandate an insanity defense and this section does not deprive a defendant of his due process rights under the state or federal Constitution. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990).

A statement by defense counsel asserting the impossibility of a psychiatrist offering an opinion as to defendant's insanity without a legal standard to work with did not suffice to

create a justiciable issue as to whether the abolition of the insanity defense deprived the defendant's due process rights; therefore, the trial court properly refused to render a declaratory judgment on the issue. *State v. Rhoades*, 119 Idaho 594, 809 P.2d 455 (1991).

Defendant sought a pre-trial ruling from the trial court as to the constitutionality of this section, but did not present any evidence or make any representation sufficient to create a justiciable controversy on the issue of the insanity defense; therefore, the record did not create a justiciable controversy sufficient to support a ruling on the issue of the repeal of the insanity defense. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

The validity of this section eliminating mental condition as a defense in criminal proceedings is now established in Idaho case law. *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

Where defendant argued that the Supreme Court should reconsider its prior rulings on the constitutionality of this section but offered no new basis upon which to consider the issue, the court was guided by stare decisis to adhere to its earlier opinions. *State v. Gomez*, 126 Idaho 83, 878 P.2d 782 (1994), cert. denied, 513 U.S. 1005, 115 S. Ct. 522, 130 L. Ed. 2d 427 (1994).

The repeal of the insanity defense does not violate the due process clauses of the Idaho or United States Constitutions. *State v. Moore*, 126 Idaho 208, 880 P.2d 238 (1994).

Expert Evidence.

This section merely disallows mental condition from providing a complete defense to the crime and may allow the conviction of persons who may be insane by some former insanity test or medical standard, but who nevertheless have the ability to form intent and to control their actions. The statute expressly allows admission of expert evidence on the issues of mens rea or any state of mind which is an element of the crime. *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Instructions.

Where jury instructions clearly set out the specific intent required for the crime of robbery, and the jury was instructed that they could find that at the time the alleged crime was committed the defendant was suffering from a mental condition which prevented him from forming the specific intent, the court's instructions fairly and accurately presented the issue of intent and stated the applicable law correctly. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Lacking Capacity.

An individual must be found competent to stand trial. In addition, those individuals who

are incapable of forming the necessary intent needed for the crime are protected by the mens rea requirements of this section and §§ 18-114 and 18-115. Finally, those "profoundly or severely retarded" individuals who do not fall under the first two protections and are convicted and who are "wholly lacking capacity to appreciate the wrongfulness of their actions" are protected by the sentencing provisions of § 19-2523. *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Mental Condition as Evidentiary Question.

Sections 18-114, 18-115 and this section are not in conflict, since §§ 18-114 and 18-115 do not mandate the existence of a defense based upon insanity, but rather, this section reduces the question of mental condition from the status of a formal defense to that of an evidentiary question. This section continues to recognize the basic common law premise that only responsible defendants may be convicted. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

No Justiciable Controversy in Record.

The Supreme Court upheld the trial court's finding that the record did not create a justiciable controversy to support a ruling on the issue of the repeal of the insanity defense where there was nothing before the court to indicate an insanity defense had been raised, as a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the record before the trial court contained nothing more than the statement of counsel that he desired to inquire into the viability of the insanity defense, and that although defendant had been examined by a psychiatrist, no opinion in any form as to defendant's mental state could be forthcoming unless the court provided an operative legal definition of insanity, counsel's unsworn statement and the testimony of a law enforcement officer did not provide a factual showing sufficient to create a justiciable issue before the court. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

Psychological Evaluation Not Compelled.

The Fifth Amendment to the United States Constitution and Idaho Const., Art. I, § 13 prohibit compelling a criminal defendant to be a witness against himself or herself. Following the repeal of the insanity defense, no

statutory scheme remains through which a psychological evaluation can be compelled without threatening the rights guaranteed under both of these constitutions. *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

Sentence.

Under this section, a judge can select either a probation program or a sentence of incar-

ceration for a mentally ill convicted defendant; therefore, where the defendant, who was mentally ill, pled guilty to a charge of lewd conduct with a minor under the age of 16 years, custody in the Department of Health and Welfare was not an option and the judge did not err in sentencing the defendant to the custody of the board of correction. *State v. Desjarlais*, 110 Idaho 100, 714 P.2d 69 (Ct. App. 1986).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Acquittal denied.

Appeal as proper method of challenge.

Authority of department.

Automatic commitment to institution.

Availability of habeas corpus writ.

Challenge to confinement.

Equal protection.

Substantial capacity.

Time allowed for examination.

Transfer of inmates.

Acquittal Denied.

Where the examining psychiatrist's report stated that defendant could appreciate the wrongfulness of his conduct but that it was very difficult to judge whether defendant could conform his conduct to the requirements of the law at the time of the murder, the report was insufficient for a finding of insanity and therefore the court's denial of defendant's motion for acquittal was proper. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

Appeal as Proper Method of Challenge.

The district court did not err when it dismissed the declaratory judgment action brought by criminal defendants, who were attacking their automatic commitment to mental institutions following their acquittal of criminal charges by reason of mental disease or defect, since the proper method of contesting the judicial decisions was by appeal. *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 652 P.2d 649 (1982).

Authority of Department.

Once a commitment to the department of health and welfare is made by the court, the department has the power to determine the method and type of treatment and the location of the treatment, and the department can transfer the patient from one treatment facility to another without judicial authorization where the transfer is consistent with the mental health needs of the patient, but the department cannot release the patient with-

out a hearing before the committing court. *Flores v. Lodge*, 101 Idaho 533, 617 P.2d 837 (1980).

Automatic Commitment to Institution.

Under former statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect, an accused who asserted the defense of mental disease or defect, and was acquitted on that basis, could be automatically committed to a mental institution without further hearing and such automatic commitment did not violate the acquittee's rights to due process or equal protection because his dangerous mental condition was established by his own admission. The committed acquittee, thereafter, bore the burden of establishing his right to release by showing, pursuant to authorized procedures, that he was no longer dangerously insane. *Penny v. State, Dep't of Health & Welfare*, 103 Idaho 689, 652 P.2d 193 (1982).

Since the differences between the release procedures under §§ 66-327, 66-337 and 66-343 regarding persons involuntarily committed under § 66-329, and the procedures under statute requiring automatic commitment of defendants acquitted on ground of mental disease or defect, were minor, and since the state is reasonably entitled to take greater precaution in releasing persons judicially determined to have already endangered the public safety than may be appropriate for persons committed under § 66-329, defendants committed under the automatic commitment statute were not denied equal protection of the law. *Penny v. State, Dep't of Health & Welfare*, 103 Idaho 689, 652 P.2d 193 (1982).

An accused who successfully asserted the defense of mental disease or defect and was automatically committed to mental institution was not denied his right to a hearing and judicial determination on the question of his mental condition in that those rights were accorded him at the time his defense of mental disease or defect was tendered and accepted. The fact that two separate statutes governed the recognition of those rights, i.e.,

former statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect and § 66-329 governing involuntary civil commitments did not deny equal protection, but rather simply reflected differing factual settings under which those rights were equally recognized. *Penny v. State, Dep't of Health & Welfare*, 103 Idaho 689, 652 P.2d 193 (1982).

It was within the province of the legislature to establish reasonable time limits for release of defendants under former statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect in order to ensure that a patient could be released without endangering himself or others. *Penny v. State, Dep't of Health & Welfare*, 103 Idaho 689, 652 P.2d 193 (1982).

Availability of Habeas Corpus Writ.

Where fundamental constitutional errors occurred which would render the commitment proceedings and the order of commitment void, then custody in mental institutions could still properly be challenged in an application for a writ of habeas corpus, even though no appeal was filed. *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 652 P.2d 649 (1982).

Challenge to Confinement.

The appropriate method of challenging the confinement of a person who claimed that he was not receiving care and treatment as required by application to the committing court and not by petition for writ of habeas corpus. *Flores v. Lodge*, 101 Idaho 533, 617 P.2d 837 (1980).

Equal Protection.

A commitment pursuant to former law that provided for commitment of acquitted defendant did not violate an acquittee's right to equal protection of the laws in failing to provide a hearing as to the acquittee's present mental illness or dangerousness at the initial state of commitment, or at the expiration of the acquittee's hypothetical criminal sentence. *Stoneberg v. State*, 106 Idaho 519, 681 P.2d 994 (1984).

It did not violate equal protection principles to hold a person acquitted on grounds of mental disease or defect in confinement for a period longer than one may be criminally incarcerated for the commission of the same offense. *Stoneberg v. State*, 106 Idaho 519, 681 P.2d 994 (1984).

Substantial Capacity.

This section provides that mental illness is an affirmative defense which justifies acquittal; the accused must lack substantial capacity, not total capacity. *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986).

Where the trial court misinterpreted this section to require that the accused lack total capacity, the jury was precluded from considering the affirmative defense of mental illness, and the defendant was prejudiced by the misinterpretation of this section and the subsequent withdrawal of the proposed jury instruction; therefore, the conviction was reversed. *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986).

Time Allowed for Examination.

Where a defendant was given only two days to prepare an examination, the amount of time allowed was insufficient and the defendant's substantial rights were prejudiced by the court's denial of a motion for a continuance. *State v. Cook*, 98 Idaho 686, 571 P.2d 332 (1977).

Transfer of Inmates.

Where an inmate had been committed to a mental health facility after being acquitted of a first degree murder charge by reason of mental disease or defect, the department of health and welfare had authority to transfer the inmate from one mental health institution to another without prior approval of the district court that had committed him but did not have authority to discharge or conditionally release him without first obtaining approval from the court. *State v. Nielson*, 97 Idaho 330, 543 P.2d 1170 (1975).

Collateral References. 22 and 22A C.J.S., Criminal Law, §§ 99-108, 734-739.

18-208, 18-209. Admissibility of evidence of mental disease — Mental illness as affirmative defense. [Repealed.]

Compiler's notes. These sections, which comprised (I.C., §§ 18-208, 18-209, as added by 1972, ch. 336, § 1, p. 844) were repealed by

S.L. 1982, ch. 368, § 1, effective July 1, 1982. For present law, see §§ 18-207, 19-2523.

18-210. Lack of capacity to understand proceedings — Delay of trial. — No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an

offense so long as such incapacity endures. [I.C., § 18-210, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1970, ch. 31, § 4, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-210, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Sec. to sec. ref. This section is referred to in § 18-3302.

Cited in: *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983); *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

ANALYSIS

Competency to stand trial.

Discretion of court.

Pre-sentence mental examination.

Psychiatric report.

Competency to Stand Trial.

The district court did not err in finding the defendant competent to stand trial on the charges of aggravated battery and burglary where, although there may have been a viable issue as to whether the district court correctly found the defendant competent to stand trial and correctly accepted the defendant's guilty plea, the defendant had waived his right to appeal the district court's ruling due to his unconditional plea of guilty to aggravated battery in exchange for the dismissal of the burglary charge. *State v. Green*, 130 Idaho 503, 943 P.2d 929 (1997).

The test to determine whether a criminal defendant is competent to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. *State v. Stone*, 132 Idaho 490, 975 P.2d 223 (Ct. App. 1999).

Where the district court made a credibility assessment of trial counsel, finding her statement that the defendant understood the proceedings to be credible, and where the court also determined that, although it trusted a psychiatrist's opinion that the defendant suffered from episodic psychosis, it would not accept the doctor's opinion that the defendant was incompetent at the time of trial because the doctor did not base his opinion on any personal communications with the defendant, nor on any medical evaluations performed during trial, there was no showing of clear

error in the court's finding the defendant competent to stand trial, and the denial of post-conviction relief was affirmed. *Stone v. State*, 132 Idaho 490, 975 P.2d 223 (Ct. App. 1999).

Right to counsel in post-conviction proceedings was not a constitutional right, but a matter left to the discretion of the trial judge; however, I.C.R. 44.2 provides for the mandatory appointment of counsel for post-conviction review after the imposition of the death penalty, and where the district court considered the evidence on defendant's competency and issued an order finding him competent to waive the assistance of counsel and to proceed pro se, the district court's decision finding that defendant had the capacity to waive his right to counsel was supported by substantial, competent, although conflicting evidence, and accordingly would not be disturbed. *State v. Lovelace*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 62 (Apr. 22, 2004).

Where defendant had been found competent to stand trial and that finding of competence was not contested, the trial court was not required to hold a hearing on the issue and where a second evaluation was conducted pursuant to an order signed by the district court, upon the request of newly appointed counsel, the magistrate and the district court properly acted to protect the defendant's right to a fair trial. *State v. Lovelace*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 62 (Apr. 22, 2004).

Discretion of Court.

The issue of a defendant's fitness to proceed is determined by the trial court, and while the trial judge is under a continuing duty to observe a defendant's ability to understand the proceedings against him, even under this section and §§ 18-211 and 18-212 some degree of discretion is permitted in determining whether reasonable grounds exist to require an examination. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Pre-Sentence Mental Examination.

The trial court did not err by not ordering a pre-sentence mental examination where there was extensive evidence to support the trial court's conclusion that defendant was competent at sentencing. *State v. Moore*, 126 Idaho 208, 880 P.2d 238 (1994).

Psychiatric Report.

Where the examining psychiatrist's report indicated that defendant had no problem understanding the proceedings in a murder prosecution, the fact that defendant lacked the inner or emotional strength to be an effective witness did not render him unable to assist in his own defense and, thus, incompetent to stand trial. *State v. Powers*, 96 Idaho

833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976). **Collateral References.** 22 C.J.S., Criminal Law, §§ 99-113.

18-211. Examination of defendant — Appointment of psychiatrists and licensed psychologists — Hospitalization — Report. —

(1) Whenever there is reason to doubt the defendant's fitness to proceed as set forth in section 18-210, Idaho Code, the court shall appoint at least one (1) qualified psychiatrist or licensed psychologist or shall request the director of the department of health and welfare to designate at least one (1) qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant to assist counsel with defense or understand the proceedings. The appointed examiner shall also evaluate whether the defendant lacks capacity to make informed decisions about treatment. The costs of examination shall be paid by the defendant if he is financially able. The determination of ability to pay shall be made in accordance with chapter 8, title 19, Idaho Code.

(2) Within three (3) days, excluding Saturdays, Sundays and legal holidays, of the appointment or designation, the examiner shall determine the best location for the examination. If practical, the examination shall be conducted locally on an outpatient basis.

(3) If the examiner determines that confinement is necessary for purposes of the examination, the court may order the defendant to be confined to a jail, a hospital, or other suitable facility for that purpose for a period not exceeding thirty (30) days. The order of confinement shall require the county sheriff to transport the defendant to and from the facility and shall notify the facility of any known medical, behavioral, or security requirements of the defendant. The court, upon request, may make available to the examiner any court records relating to the defendant.

(4) In such examination any method may be employed which is accepted by the examiner's profession for the examination of those alleged not to be competent to assist counsel in their defense.

(5) Upon completion of the examination a report shall be submitted to the court and shall include the following:

- (a) a description of the nature of the examination;
- (b) a diagnosis or evaluation of the mental condition of the defendant;
- (c) an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense;
- (d) an opinion whether the defendant lacks the capacity to make informed decisions about treatment. "Lack of capacity to make informed decisions about treatment" means the defendant's inability, by reason of his mental condition, to achieve a rudimentary understanding of the purpose, nature, and possible significant risks and benefits of treatment, after conscientious efforts at explanation.

(6) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

(7) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(8) When the defendant wishes to be examined by an expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purpose of examination.

(9) In addition to the psychiatrist or licensed psychologist, the court may appoint additional experts to examine the defendant. In the event a defendant is suspected of being developmentally disabled, the examination shall proceed with those experts set out in subsection (7) of section 66-402, Idaho Code.

(10) If the defendant lacks capacity to make informed decisions about treatment, as defined in section 66-317, Idaho Code, the court may authorize consent to be given pursuant to section 66-322, Idaho Code. If the defendant lacks capacity to make informed decisions as defined in subsection (9) of section 66-402, Idaho Code, the court may authorize consent to be given pursuant to sections 66-404 and 66-405, Idaho Code.

(11) If the defendant was confined solely for the purpose of examination, he shall be released from the facility within three (3) days, excluding Saturdays, Sundays and legal holidays following notification of completion of the examination. [I.C., § 18-211, as added by 1972, ch. 336, § 1, p. 884; am. 1974, ch. 165, § 1, p. 1405; am. 1980, ch. 312, § 1, p. 797; am. 1982, ch. 368, § 3, p. 919; am. 1987, ch. 40, § 1, p. 67; am. 1996, ch. 225, § 2, p. 737; am. 1998, ch. 90, § 7, p. 315; am. 1999, ch. 293, § 4, p. 732; am. 2000, ch. 234, § 1, p. 656.]

Compiler's notes. A former section, which comprised S.L. 1970, ch. 31, § 5, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-211, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section.

Sections 6 and 8 of S.L. 1998, ch. 90 are compiled as §§ 66-339C and 18-3302, respectively.

Section 1 of S.L. 1996, ch. 225 is compiled as § 18-207.

Sections 6 and 8 of S.L. 1998, ch. 90 are compiled as §§ 66-339C and 18-3302, respectively.

Section 3 of S.L. 1999, ch. 293 is compiled as § 15-5-101.

Sec. to sec. ref. This section is referred to in §§ 18-215, 66-317, 66-318, 66-319, 66-320 and 66-338.

Cited in: State v. Cook, 98 Idaho 686, 571 P.2d 332 (1977); State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981); State v. Storey, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); State v. Beebe, 113 Idaho 977, 751

P.2d 673 (Ct. App. 1988); State v. King, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

ANALYSIS

Collateral attack on examination.
Determination of fitness.
Discretion of court.
Drug abuse.
Examination during trial.
Further evaluation not required.
Ineffective assistance of counsel.
Sufficiency of examination.

Collateral Attack on Examination.

Where trial court appointed psychiatrist under this section and defendant played no part in the appointment, did not exercise his right to have his own psychiatrist appointed under subsection (2) of § 18-213 (repealed), and did not influence state's inactivity with respect to having additional psychiatrists examine him under this section or § 18-213 (repealed), state could not have kidnapping and rape case reopened five years later based on testimony of two psychiatrists disputing finding of psychiatrist in original case, since defendant in invoking procedure under § 18-213 (repealed) did not breach a duty to anyone so as to constitute a constructive fraud upon

the original trial court. *State v. Hightower*, 101 Idaho 749, 620 P.2d 783 (1980).

Determination of Fitness.

Where the examining psychiatrist's report indicated that defendant had no problem understanding the proceedings in a murder prosecution, the fact that defendant lacked the inner or emotional strength to be an effective witness did not render him unable to assist in his own defense and, thus, incompetent to stand trial. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

Where the psychiatric report on the defendant did not contain an opinion on the defendant's capacity to understand the proceedings against him, but did state that the psychiatrist found no mental disease or defect, there was no fundamental error in admitting the report even though it did not contain an opinion specifically couched in the statutory language. *State v. Wells*, 103 Idaho 137, 645 P.2d 371 (Ct. App. 1982).

The mere fact that defendant did not heed his counsel's advice and was uncooperative, or that his conduct on the stand would have more likely hurt than helped his case, did not render him incompetent to stand trial. *State v. Longoria*, 133 Idaho 819, 992 P.2d 1219 (Ct. App. 1999).

Discretion of Court.

The issue of a defendant's fitness to proceed is determined by the trial court, and while the trial judge is under a continuing duty to observe a defendant's ability to understand the proceedings against him, even under this section and §§ 18-210 and 18-212 some degree of discretion is permitted in determining whether reasonable grounds exist to require an examination. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Drug Abuse.

Where the record indicated that it was chronic drug abuse, not mental disease or defect, that underlay defendant's extensive anti-social conduct, the district judge was not required to appoint a psychiatrist or a psychologist to examine defendant. *State v. Dryden*, 105 Idaho 848, 673 P.2d 809 (Ct. App. 1983) (Decision based on section prior to 1982 amendment).

Examination During Trial.

Giving defendant a psychiatric examination during trial and allowing the doctor to

testify as to the examination and defendant's mental state was permissible under this section. *State v. Gerdan*, 96 Idaho 516, 531 P.2d 1161 (1975).

Further Evaluation Not Required.

Where the trial transcript and record did not even suggest that defendant was so incompetent as to be unable to stand trial, the trial judge spoke with the defendant concerning his ability to control himself, the defendant spoke coherently and demonstrated an awareness of the proceedings, neither the defendant nor his counsel requested a judicial determination of competency by the trial court, and nothing in the record suggested that defendant's condition had significantly deteriorated since the pretrial evaluations, the evidence supported the magistrate's finding of competency, and the trial court's failure to order further medical evaluations and to find defendant incompetent was not error. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Ineffective Assistance of Counsel.

Where the record indicates that counsel was aware of the value of doctor's observation in his report under this section that defendant was having trouble communicating with his attorneys and counsel alerted the court to these problems and argued for further assistance, any assertion that counsel was ineffective in this regard is without merit, and failure to subpoena the doctor for the hearing was not prejudicial. *State v. Soto*, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

Sufficiency of Examination.

The psychiatric examinations available to a defendant under this section and § 19-852(a) were sufficient to enable him to evaluate an asserted insanity defense and were, likewise, sufficient to satisfy the constitutional demands of fundamental fairness. Accordingly, where, notwithstanding some apparent irregularities in preparing and filing the evaluation report, the defendant had already received an adequate examination at state expense, the trial court did not err in exercising its discretion to deny the defendant funds for an additional psychiatric examination. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982) (Decision prior to 1982 enactment of § 18-207).

18-212. Determination of fitness of defendant to proceed — Suspension of proceeding and commitment of defendant — Postcommitment hearing. — (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. The court

shall also determine, based on the examiner's findings, whether the defendant lacks capacity to make informed decisions about treatment. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed pursuant to section 18-211, Idaho Code, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross-examine the psychiatrist or licensed psychologist who submitted the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsections (5) and (6) of this section, and the court shall commit him to the custody of the director of the department of health and welfare, for a period not exceeding ninety (90) days, for care and treatment at an appropriate facility of the department of health and welfare or if the defendant is found to be dangerously mentally ill as defined in section 66-1305, Idaho Code, to the department of correction for a period not exceeding ninety (90) days. The order of commitment shall include the finding by the court whether the defendant lacks capacity to make informed decisions about treatment. For purposes of this section "facility" shall mean a state hospital, institution, mental health center, or those facilities enumerated in subsection (8) of section 66-402, Idaho Code, equipped to evaluate or rehabilitate such defendants. The order of commitment shall require the county sheriff to transport the defendant to and from the facility and require an evaluation of the defendant's mental condition at the time of admission to the facility, and a progress report on the defendant's mental condition. The progress report shall include an opinion whether the defendant is fit to proceed, or if not, whether there is a substantial probability the defendant will be fit to proceed within the foreseeable future. If the report concludes that there is a substantial probability that the defendant will be fit to proceed in the foreseeable future, the court may order the continued commitment of the defendant for an additional one hundred eighty (180) days. If at any time the director of the facility to which the defendant is committed determines that the defendant is fit to proceed, such determination shall be reported to the court.

(3) If during a commitment under this section a defendant who has the capacity to make informed decisions about treatment refuses any and all treatment, or the only treatment available to restore competency for trial, the court shall, within seven (7) days, excluding weekends and holidays, of receiving notice of the defendant's refusal from the facility, conduct a hearing on whether to order involuntary treatment or order such other terms and conditions as may be determined appropriate. The burden shall be on the state to demonstrate grounds for involuntary treatment including, but not limited to: the prescribed treatment is essential to restore the defendant's competency, the medical necessity and appropriateness of the prescribed treatment, no less intrusive treatment alternative exists to render the defendant competent for trial, and other relevant information. If

each of these findings is made by the court, treatment shall be ordered consistent with the findings.

(4) Each report shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant. Upon receipt of a report, the court shall determine, after a hearing if a hearing is requested, the disposition of the defendant and the proceedings against him. If the court determines that the defendant is fit to proceed, the proceeding shall be resumed. If at the end of the initial ninety (90) days the court determines that the defendant is unfit and there is not a substantial probability the defendant will be fit to proceed within the foreseeable future or if the defendant is not fit to proceed after the expiration of the additional one hundred eighty (180) days, involuntary commitment proceedings shall be instituted pursuant to either section 66-329 or 66-406, Idaho Code, in the court in which the criminal charge is pending.

(5) In its review of commitments pursuant to section 66-337, Idaho Code, the department of health and welfare shall determine whether the defendant is fit to proceed with trial. The department of health and welfare shall review its commitments pursuant to chapter 4, title 66, Idaho Code, and may recommend that the defendant is fit to proceed with trial. If the district court which committed the defendant pursuant to section 66-406, Idaho Code, agrees with the department's recommendation and finds the conditions which justified the order pursuant to section 66-406, Idaho Code, do not continue to exist, criminal proceedings may resume. If the defendant is fit to proceed, the court in which the criminal charge is pending shall be notified and the criminal proceedings may resume. If, however, the court is of the view that so much time has elapsed, excluding any time spent free from custody by reason of the escape of the defendant, since the commitment of the defendant that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

(6) If a defendant escapes from custody during his confinement, the director shall immediately notify the court from which committed, the prosecuting attorney and the sheriff of the county from which committed. The court shall forthwith issue an order authorizing any health officer, peace officer, or the director of the institution from which the defendant escaped, to take the defendant into custody and immediately return him to his place of confinement. [I.C., § 18-212, as added by 1972, ch. 336, § 1, p. 844; am. 1974, ch. 165, § 2, p. 1405; am. 1977, ch. 13, § 1, p. 25; am. 1980, ch. 312, § 2, p. 797; am. 1982, ch. 368, § 4, p. 919; 1987, ch. 40, § 2, p. 67; am. 1999, ch. 293, § 5, p. 732; am. 2000, ch. 234, § 2, p. 656.]

Compiler's notes. A former section, which comprised S.L. 1970, ch. 31, § 6, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-212, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in

the section as it existed prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 2 of S.L. 1977, ch. 13 has been repealed.

Section 5 of S.L. 1982, ch. 368 is compiled as § 18-215.

Section 6 of S.L. 1999, ch. 293 is compiled as § 63-3022E.

Section 3 of S.L. 2000, ch. 234 is compiled as § 66-337.

Sec. to sec. ref. This section is referred to in §§ 18-215, 19-852, 66-317, 66-324, 66-337, 66-338 and 66-1304.

Cited in: *State v. Hoffman*, 104 Idaho 510, 660 P.2d 1353 (1983).

ANALYSIS

Alternative procedure to § 66-329.

Appeal.

—Question.

Discretion of court.

Further evaluation not required.

Hearing.

—Not required.

—Required.

Ineffective assistance of counsel.

Procedure where defendant mildly retarded.

Putting issue in question.

Alternative Procedure to § 66-329.

Under this section, if the court in which a criminal case is pending determines that, as a result of mental disease or defect, the defendant lacks the capacity to understand the proceedings or to assist in his own defense, the court must commit the defendant to the custody of the director of the Department of Health and Welfare for care and treatment at an appropriate facility. This section is limited in application to those defendants whose fitness to participate in the criminal proceedings has been drawn into question and is an alternative procedure, rather than the sole procedure to the exclusion of § 66-329, for obtaining a commitment to a mental health facility for someone in the custody of a county sheriff. *State v. Hargis*, 126 Idaho 727, 889 P.2d 1117 (Ct. App. 1995).

Appeal.

—Question.

The question on appeal is whether there was sufficient, competent, although conflicting, evidence for the district court to find that defendant had the capacity to stand trial, and the trial court's finding must be clearly erroneous to justify reversal. *State v. Daniel*, 127 Idaho 801, 907 P.2d 119 (Ct. App. 1995).

Discretion of Court.

The issue of a defendant's fitness to proceed is determined by the trial court, and while the trial judge is under a continuing duty to observe a defendant's ability to understand the proceedings against him, even under this section and §§ 18-210 and 18-211 some degree of discretion is permitted in determining whether reasonable grounds exist to require an examination. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

The issue of defendant's competency was fully litigated in a single hearing. There was no showing that other evidence would have been introduced at a second hearing. The

district court did not abuse its discretion by denying the motion for a second hearing pursuant to this section. *State v. Harper*, 129 Idaho 86, 922 P.2d 383 (1996).

Further Evaluation Not Required.

Where the trial transcript and record did not even suggest that defendant was so incompetent as to be unable to stand trial, the trial judge spoke with defendant concerning his ability to control himself, defendant spoke coherently and demonstrated an awareness of the proceedings, neither the defendant nor his counsel requested a judicial determination of competency by the trial court, and nothing in the record suggested that defendant's condition had significantly deteriorated since the pretrial evaluations, the evidence supported the magistrate's finding of competency, and the trial court's failure to order further medical evaluations and to find defendant incompetent was not error. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Hearing.

—Not Required.

Where the competency question has not been raised, the trial judge has no duty to independently inquire as to the competency of the defendant. *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979).

Because defendant's fitness to proceed was not called into question before the trial court, the absence of a hearing on defendant's fitness and the lack of a specific finding on defendant's competency did not amount to fundamental error, and defendant's argument that the trial court erred in failing to determine defendant's fitness prior to accepting a guilty plea failed. *State v. Hayes*, 138 Idaho 761, 69 P.3d 181 (Ct. App. 2003).

—Required.

When the sanity issue has been raised, the judge must conduct a hearing to inquire as to the defendant's capacity before accepting a guilty plea. *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979).

Ineffective Assistance of Counsel.

Where defendant merely felt constrained when speaking with his caucasian attorney, the fact that counsel did not move for an examination under this section was not prejudicial and there was no ineffective assistance of counsel on this issue. *State v. Soto*, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

Procedure Where Defendant Mildly Retarded.

Where two psychologists testified at defendant's competency hearing and each psychologist found that defendant was mildly retarded, but one psychologist testified that he

believed defendant could understand the proceedings and assist his counsel if the courtroom process was slowed down sufficiently, defendant was judged competent to stand trial, and court did not err in following recommendation of psychologist and allowing defendant's counsel to take recesses as necessary. *State v. Daniel*, 127 Idaho 801, 907 P.2d 119 (Ct. App. 1995).

Putting Issue in Question.

Where the defendant had announced her intention to plead not guilty by reason of insanity to a charge of first-degree murder, but later withdrew such a defense and plead

guilty to second degree murder pursuant to a plea bargain, and there was some evidence of emotional problems, but her demeanor was alert and responsive and her counsel never raised the question of her sanity as the initial defense after withdrawing it, her mental capacity was not put in question and it was not error for the trial court to fail to inquire into her capacity. *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979).

When a defendant's fitness to proceed at trial is in question, the issue shall be determined by the trial court. *State v. Daniel*, 127 Idaho 801, 907 P.2d 119 (Ct. App. 1995).

18-213, 18-214. Acquittal on ground of mental illness — Commitment of acquitted defendant — Release. [Repealed.]

Compiler's notes. These sections, which comprised (I.C., §§ 18-213, 18-214, as added by 1972, ch. 336, § 1, p. 844; am. 1974, ch. 165, §§ 3, 4, p. 1405; am. 1977, ch. 13, § 2, p.

25; am. 1980, ch. 312, §§ 3, 4, p. 797) were repealed by S.L. 1982, ch. 368, § 1, effective July 1, 1982. For present law see § 18-207.

18-215. Admissibility of statements by examined person. — A statement made by a person subjected to psychiatric or psychological examination or treatment pursuant to sections 18-211, 18-212 or 19-2522, Idaho Code, for the purposes of such examination or treatment shall not be admissible in evidence in any criminal proceeding against him on any issue other than the defendant's ability to assist counsel at trial or to form any specific intent which is an element of the crime charged, except that such statements of a defendant to a psychiatrist or psychologist as are relevant for impeachment purposes may be received subject to the usual rules of evidence governing matters of impeachment. [I.C., § 18-215, as added by 1972, ch. 336, § 1, p. 844; am. 1980, ch. 312, § 5, p. 797; am. 1982, ch. 368, § 5, p. 919.]

Compiler's notes. A former section, which comprised S.L. 1970, ch. 31, § 9, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sections 4 and 6 of S.L. 1982, ch. 368 are compiled as §§ 18-212 and 18-310, respectively.

Section 6 of S.L. 1980, ch. 312 declared an emergency. Approved April 2, 1980.

Section 14 of S.L. 1982, ch. 368 read: "This act shall be in full force and effect and shall apply to persons against whom a criminal complaint is filed on or after July 1, 1982."

18-216. Criminal trial of juveniles barred — Exceptions — Jurisdictional hearing — Transfer of defendant to district court. — (1) A person shall not be tried for or convicted of an offense if:

- (a) At the time of the conduct charged to constitute the offense he was less than fourteen (14) years of age; or
- (b) At the time of the conduct charged to constitute the offense he was less than eighteen (18) but not less than fourteen (14) years of age, unless:
 1. A court of this state has no jurisdiction over him pursuant to chapter 5, title 20, Idaho Code, or

2. The court having jurisdiction pursuant to chapter 5, title 20, Idaho Code, has entered an order waiving jurisdiction and consenting to the institution of criminal proceedings against him.

(2) No court shall have jurisdiction to try or convict a person of an offense if criminal proceedings against him are barred by subsection (1) of this section. When it appears that a person charged with the commission of an offense may be of such an age that criminal proceedings may be barred under subsection (1) of this section, the court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the court that the criminal proceeding is not barred upon such grounds. If the court determines that the proceeding is barred, custody of the person charged shall be surrendered to the court having jurisdiction pursuant to chapter 5, title 20, Idaho Code, and the case, including all papers and processes relating thereto, shall be transferred. [I.C., § 18-216, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 4, p. 1102; am. 1994, ch. 131, § 5, p. 296; am. 2004, ch. 23, § 3, p. 25.]

Compiler's notes. A former section, which comprised S.L. 1970, ch. 31, § 10, p. 61, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section prior to its repeal.

Sections 3 and 5 of S.L. 1972, ch. 381 are compiled herein as §§ 18-111B and 18-303, respectively.

Sections 4 and 6 of S.L. 1994, ch. 131 are compiled as §§ 18-206 and 18-306, respectively.

Sections 2 and 4 of S.L. 2004, ch. 23 are compiled as §§ 18-113B and 18-1502B, respectively.

Cited in: *State v. Anderson*, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985); *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App. 1986).

ANALYSIS

Age of defendant.

Intent of statute.

Waiver of jurisdiction.

—Review of waiver.

Age of Defendant.

Where the evidence at defendant's jury trial indicated that defendant was 13 years old when most of the sexual contacts with his minor victim occurred and it was unclear how many acts occurred after he turned 14, his convictions for lewd conduct with a minor under 16 were vacated, because under Idaho Code § 18-216(1) defendant could not be convicted for crimes that he committed when he was less than 14 years old. *State v. Kavajecz*, — Idaho —, 80 P.3d 1083 (2003).

Intent of Statute.

The enactment of this section and its antecedents, as gained from the literal language,

was to define the minimum age at which a child could be tried for, and convicted of, a criminal offense as if he were an adult. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

Sections 16-1806 (see now § 20-508) and this section make it clear that not all chronological age juveniles will receive treatment as juveniles. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

The legislative history of this section shows an intent to change the common law which at times authorized the prosecution for a crime of a child as young as seven years of age. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

Section 16-1806 (see now § 20-508) and its antecedents were intended to implement the statutory provisions of this section and, to the extent of any conflict, this section controls. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

Waiver of Jurisdiction.

Prosecution of defendant who was 17 years of age at time of alleged offense was barred where court having jurisdiction under the Youth Rehabilitation Act (see now Juvenile Corrections Act, §§ 20-501 — 20-549) had not conducted a hearing or entered an order based thereon, waiving jurisdiction and consenting to institution of such prosecution. *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972).

When an order is entered waiving juvenile jurisdiction, the jurisdiction of the magistrate's division of the district court, sitting as a juvenile court, is extinguished and at the same time there is effected a transfer of jurisdiction to the district court sitting as an adult criminal court. *State v. Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977).

In proceeding to determine whether or not juvenile jurisdiction should be waived, the

only determination by the magistrate was the existence of probable cause to justify transfer to the adult court and such determination could be based on hearsay and need not be tested by cross-examination and confrontation. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

The nature of the accusation is a relevant factor for the court to consider in deciding whether or not to waive jurisdiction. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

A probable cause finding in conjunction with the procedure of waiving juvenile jurisdiction is not required by the Idaho or federal constitutions, since when a juvenile court waives jurisdiction an adult court must still conduct a preliminary hearing at which probable cause must be determined; and, if juvenile jurisdiction is not waived, a probable cause determination is made by the juvenile court as to whether and how to proceed on the juvenile petition. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

In proceedings to determine whether or not

juvenile jurisdiction should be waived where the magistrate found that each of the defendants was emotionally and mentally mature and that the prognosis for each defendant under available juvenile rehabilitation programs was unsatisfactory and that they would likely remain dangerous to the public if released at age 21 and in the interim each would be likely to disrupt the rehabilitation of other juveniles, such finding met the criteria necessary for waiver of jurisdiction set forth in *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972). *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

—Review of Waiver.

A review of a juvenile jurisdiction waiver must be sought before the charges as an adult have proceeded to trial and, in effectuating such an appeal, review should first be sought in the district court while proceedings in the adult court are held in abeyance pending resolution of the waiver issue. *State v. Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977).

CHAPTER 3

NATURE AND EXTENT OF PUNISHMENT IN GENERAL

SECTION.

- 18-301. [Repealed.]
- 18-302. Punishment for acts also punishable as contempt.
- 18-303. Common law offenses — Punishment — Imprisonment for nonpayment of fine.
- 18-304. Aiding in misdemeanors.
- 18-305. Conviction of attempt when crime is consummated.
- 18-306. Punishment for attempts.
- 18-307. Attempt resulting in different crime.
- 18-308. Successive terms of imprisonment.
- 18-309. Computation of term of imprisonment.

SECTION.

- 18-310. Imprisonment — Effect on civil rights and offices.
- 18-311. [Repealed.]
- 18-312. Convicts — Capacity as witnesses — Capacity to convey property.
- 18-313. Protection of person of convict.
- 18-314. Property of convict not forfeited.
- 18-315. Omission of public duty.
- 18-316. [Repealed.]
- 18-317. Punishment of offenses for which no penalty is fixed.

18-301. Acts punishable in different ways — Double jeopardy. [Repealed.]

Compiler's notes. Former § 18-301, which comprised I.C., § 18-301, as added by 1972, ch. 336, § 1, p. 844, was repealed by

S.L. 1995, ch. 16, § 1, effective February 13, 1995.

18-302. Punishment for acts also punishable as contempt. — A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt. [I.C., § 18-302, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7231; C.S., § 8603; I.C.A., § 17-302, was repealed by S.L.

1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-302, as added by 1971, ch.

143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Contempts in civil proceedings, §§ 7-601 — 7-614.

Contempts in criminal proceedings, § 18-1801.

Criminal acts punishable as contempts, § 18-105.

Inherent Powers of Courts.

Where certain acts of contempt are made a crime under our statute, making of such acts punishable as crimes does not affect any power conferred on court to impose or inflict punishment for contempt. *McDougall v. Sheridan*, 23 Idaho 191, 128 P. 954 (1913).

18-303. Common law offenses — Punishment — Imprisonment for nonpayment of fine. — All offenses recognized by the common law as crimes and not herein enumerated are punishable, in case of felony, by imprisonment in the state prison for a term not less than one (1) year nor more than five (5) years; and in case of misdemeanors, by imprisonment in the county jail for a term not exceeding six (6) months or less than one (1) month, or by fine not exceeding \$500, or both such fine and imprisonment. And whenever any fine is imposed for any felony or misdemeanor, whether such be by statute or at common law and the party upon whom the fine is imposed has the ability to pay said fine, the party upon whom the fine is imposed shall be committed to the county jail, when not sentenced to the state prison, until the fine is paid. [I.C., § 18-303, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 5, p. 1102.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 151; R.S., R.C., & C.L., § 7332; C.S., § 8604; I.C.A., § 17-303 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-303, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section as added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 4 of S.L. 1972, ch. 381 is compiled herein as § 18-216.

Cross ref. Criminal offenses for which no penalties are fixed punishable as misdemeanors, § 18-317.

General penalties for felonies, § 18-112.

General penalties for misdemeanors, § 18-113.

Application.

This section and § 19-2512 authorizing trial court to impose alternative sentence of imprisonment against defendant in case of failure to pay fine or costs, or both fine and costs, as case may be, have reference to judgment upon original trial of a criminal case. In re *Lucas*, 17 Idaho 164, 104 P. 657 (1909).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 11-14, 808.

22 C.J.S., Criminal Law, § 24.

18-304. Aiding in misdemeanors. — Whenever an act is declared a misdemeanor, and no punishment for counseling, aiding in, soliciting or inciting the commission of such acts [act] is expressly prescribed by law, every person who counsels, aids, solicits or incites another in the commission of such act is guilty of a misdemeanor. [I.C., § 18-304, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., & R.C., § 7233; am. 1917, ch. 137, p. 447; reen. C.L., § 7233; C.S., § 8605; I.C.A., § 17-304, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising

I.C., § 18-304, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

The bracketed word "act" was inserted by the compiler.

Cited in: *State v. Thompson*, 136 Idaho 322, 33 P.3d 213 (Ct. App. 2001).

Collateral References. 22 C.J.S., Criminal Law, § 127.

18-305. Conviction of attempt when crime is consummated. — Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury, and directs such person to be tried for such crime. [I.C., § 18-305, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7234; C.S., § 8606; I.C.A., § 17-305, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-305, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Sec. to sec. ref. This section is referred to in § 18-307.

ANALYSIS

Felony murder.
Rape.

Felony Murder.

Because intent is not an element of felony murder, but is an element of attempt to commit a crime, there is no such crime as attempted felony murder. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

Rape.

In prosecution for statutory rape, defendant may be convicted of assault with intent to commit rape. *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928); *State v. Smailes*, 51 Idaho 321, 5 P.2d 540 (1931).

Collateral References. 21 Am. Jur. 2d, Criminal Law, § 103.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

18-306. Punishment for attempts. — Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

(1) If the offense so attempted is punishable by imprisonment in the state prison for life, or by death, the person guilty of such attempt is punishable by imprisonment in the state prison for a term not exceeding fifteen (15) years.

(2) If the offense so attempted is punishable by imprisonment in the state prison for five (5) years or more but for less than life imprisonment, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in the county jail, as the case may be, for a term not exceeding one-half (½) the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

(3) If the offense so attempted is punishable by imprisonment in the state prison for any term less than five (5) years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one (1) year.

(4) If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half (½) the largest fine which may be imposed upon a conviction of the offense so attempted.

(5) If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half ($\frac{1}{2}$) the longest term of imprisonment and one-half ($\frac{1}{2}$) the largest fine which may be imposed upon a conviction for the offense so attempted. [I.C., § 18-306, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 6, p. 296.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 158; R.S., R.C., & C.L., § 7235; C.S., § 8607; I.C.A., § 17-306, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-306, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 5 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 5 of S.L. 1994, ch. 131 is compiled as § 18-216 and § 7 contained repeals.

Sec. to sec. ref. This section is referred to in §§ 18-307 and 18-310.

Cited in: State v. Downing, 23 Idaho 540, 130 P. 461 (1913); State v. Cotton, 100 Idaho 573, 602 P.2d 71 (1979); State v. Smith, 103 Idaho 135, 645 P.2d 369 (1982); State v. Brennan, 117 Idaho 123, 785 P.2d 687 (Ct. App. 1990); State v. Brower, 122 Idaho 450, 835 P.2d 685 (Ct. App. 1992); State v. Swader, 137 Idaho 733, 52 P.3d 878 (Ct. App. 2002).

ANALYSIS

Application.

Arson.

Brokers.

Burglary.

Discretion of court.

Length of sentence.

Lesser included offense.

Murder.

Rape.

Robbery.

Robbery and assault.

Sentence.

— Upheld.

Solicitation of attempt.

Subornation of perjury.

Unsuccessful attempts.

Application.

Where a statute defined a crime as an attempt and also stated that the offender is guilty of a misdemeanor without prescribing any punishment therefor, the former section was not applicable. State v. Reinoehl, 70 Idaho 361, 218 P.2d 865 (1949).

Where amended information charged "assault with intent to commit rape," although the attempt was not by means of threat or violence, the means by which the alleged offense was committed also constituted an

offense and was sufficiently set forth in the information as an included offense. State v. Hall, 88 Idaho 117, 397 P.2d 261 (1964).

Arson.

Attempt to commit arson is a crime under this section. State v. Collins, 3 Idaho 467, 31 P. 1048 (1892).

Brokers.

One charged with the crime of "acting as a broker" may be punished for attempt to commit such crime. State v. Johnson, 54 Idaho 431, 32 P.2d 1023 (1934).

Burglary.

Information charged attempted burglary where the information stated that the defendant on or about specified date and place did wilfully and feloniously attempt to break into and enter in the nighttime an identified building with intent to commit larceny therein. State v. Bedwell, 77 Idaho 57, 286 P.2d 641 (1955).

There was sufficient evidence to convict defendant of attempted burglary where the evidence showed that night watchman discovered that a person was attempting to break in and fired through the door, and defendant was found eight to 12 feet from the door with bullet wounds in his arm and leg, and two screw drivers near his body, and his car was parked close by. State v. Bedwell, 77 Idaho 57, 286 P.2d 641 (1955).

Discretion of Court.

In prosecution for attempted rape of a child, where the investigation disclosed that defendant, who was 22 years old when sentenced, had prior convictions for a burglary and two petit larcenies and also had a history of unlawful use and distribution of drugs and alcohol, the imposition of a ten-year indeterminate sentence did not represent an abuse of discretion and the district judge did not abuse his discretion by refusing to retain jurisdiction under § 19-2601 4. State v. Nield, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), aff'd, 106 Idaho 665, 682 P.2d 618 (1984).

The district court properly instructed the jury on the elements of the offense of kidnapping in the second degree and the instructions adequately addressed the intent requirement of the offense, accordingly, in consideration of the instructions given and in light of the Idaho Criminal Jury Instructions preface, a

separate instruction defining intent was unnecessary. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Length of Sentence.

Where record of 16 year old showed a pattern of uncontrolled substance abuse and violent behavior towards others and that most of his criminal activity occurred when he was under the influence of some massive quantity of controlled drugs or alcohol, an indeterminate sentence of ten years for attempted robbery was not excessive nor an abuse of discretion, since under § 20-223 defendant could be eligible for parole after serving one-third of the sentence. *State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982).

The 15-year indeterminate sentence for attempted second degree murder was not excessive, where the defendant wounded the night watchman four times with a .22 caliber pistol while burglarizing a convenience store, there was evidence that the victim's final wound was inflicted from close range while he was disabled and lying on his stomach, and the presentence investigation revealed several nonviolent prior offenses, including a third degree theft conviction. *State v. Bourgeois*, 111 Idaho 479, 725 P.2d 184 (Ct. App. 1986).

Defendant's sentences for attempted robbery and aggravated battery were not excessive or represent an abuse of discretion where trial judge imposed maximum concurrent sentences, 15 years, for each crime and because defendant used a firearm in committing aggravated battery, the court extended the aggravated battery sentence for an additional 15 years, as permitted by § 19-2520; for each crime the sentencing judge specified that the minimum term of confinement would be the entire length of the sentence and under these sentences defendant must spend 30 years in confinement without the possibility of parole. *State v. Sanchez*, 115 Idaho 394, 766 P.2d 1275 (Ct. App. 1988).

Identical concurrent 14-year sentences with a minimum period of confinement of ten years for attempted robbery and for first degree burglary were within the maximum penalties allowed by statute and were not excessive, even though no one was hurt and no money taken. *State v. Ellenwood*, 115 Idaho 813, 770 P.2d 822 (Ct. App. 1989).

Imposition of a ten-year unified sentence with a four-year minimum period of confinement for attempted robbery was not an abuse of discretion in light of the defendant's previous record, his past unsuccessful attempts at rehabilitation and his admitted use and sale of drugs. See *State v. Sommerfeld*, 116 Idaho 518, 777 P.2d 740 (Ct. App. 1989).

The district court properly sentenced defendant to a nine-year determinate period of confinement to be followed by a three and

one-half year indeterminate period with regard to a charge of attempted kidnapping in the second degree where the court considered all of the appropriate goals of sentencing in light of the circumstances of this particular case, and concluded that defendant's substance abuse in this case did not mitigate the seriousness of the offense, and that the community had a right to expect not to be treated as defendant had treated the victim. *State v. Connor*, 119 Idaho 1003, 812 P.2d 310 (Ct. App. 1991).

A 15-year fixed term for attempted second degree murder and a consecutive indeterminate ten-year term for assault with intent to commit rape was reasonable where psychologist concluded that defendant was not a good candidate for verbal psychotherapy and, even though defendant did not have a long prior record, the record he had was quite serious. *State v. Fenstermaker*, 122 Idaho 926, 841 P.2d 456 (Ct. App. 1992).

Lesser Included Offense.

Where there was only one event, defendant's shooting at victim's door, on which charges could be based, the charge of assault with a deadly weapon was a lesser included offense in a charge of attempted robbery such as to preclude conviction of both charges under the double jeopardy clause of the Fifth Amendment of the United States Constitution and the Idaho Constitution. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

Murder.

Where there was sufficient evidence to show that the defendant had the requisite intent to kill a human being and then acted in furtherance of that intent by encouraging another to carry through with the plan, convictions on two counts of attempted murder were affirmed. *State v. Fabeny*, 132 Idaho 917, 980 P.2d 581 (Ct. App. 1999).

Rape.

Offense of "attempt to commit rape" can be included in the charge of "assault with intent to commit rape." *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

Penalty for assault with intent to commit rape is imprisonment of one to fourteen years, and for attempt to commit rape is one half of the punishment for the crime of rape which is imprisonment for one year to life; therefore, although one half of a life sentence cannot be calculated, the actual sentence thus fixed may be less than that imposed for assault with intent to commit rape, and greater punishment is not authorized for included offense. *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

Written statements by defendant, made to and taken down by an investigating officer of the air force, corroborated testimony by

prosecutrix as to actions of defendant that led to institution of criminal proceedings and sufficiently established the corpus delicti of defendant's attempted rape of his thirteen-year-old daughter. *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

An overt act is a required element of the crime of attempted rape. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

The crime of attempted rape is an included offense in the crime of assault with intent to commit rape; specific intent to commit the rape is an element of both attempted rape and assault with intent to rape where the rape itself is not consummated. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Giving the amended information a fair and reasonable construction, and by construing the document liberally in favor of its validity, it was held that the language charging defendant with attempted rape was not so defective as to fail to inform him of the element of intent to commit rape which was essential to the crime charged. *State v. Leach*, 126 Idaho 977, 895 P.2d 578 (Ct. App. 1995).

Robbery.

Where testimony demonstrated that the defendant committed acts in furtherance of an intent to take property from a pawn shop by force when he entered the shop and gave a signal to another participant to start shooting, even though the defendant did not complete the robbery by actually taking property his actions were sufficient to sustain a verdict for attempted robbery. *State v. Fabeny*, 132 Idaho 917, 980 P.2d 581 (Ct. App. 1999).

Robbery and Assault.

Since penalty for attempted robbery is half of sentence for robbery, which is imprisonment for five years to life, while punishment for assault with a deadly weapon is not more than five years, assault could not be considered the greater offense on the grounds that it carried greater penalty; although half of life sentence cannot be calculated, court can set base maximum sentence at less than life and use such maximum to determine the sentence for attempt so that actual sentence fixed for attempted robbery may be less than sentence for assault with deadly weapon. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

Sentence.

—Upheld.

A fifteen-year determinate sentence for attempted murder and a consecutive 35-year sentence, with fifteen years determinate, for robbery was not excessive, where the character of the offense was vicious and unprovoked involving infliction of multiple stab wounds on a helpless victim. *State v. Mitchell*, 124 Idaho 374, 859 P.2d 972 (Ct. App. 1993).

The trial court properly denied defendant's motion to correct an illegal sentence where: the trial court found that for the crime of attempted first-degree murder, the maximum penalty defendant faced was one-half of a life sentence; the trial court fixed a base maximum of forty-five years based upon defendant's age and life expectancy; the trial court advised defendant that the maximum penalty he faced for attempted first-degree murder was twenty-two years and six months, one half of the base maximum; and the trial court then offered defendant the opportunity to withdraw his plea which he declined. *State v. Wood*, 125 Idaho 911, 876 P.2d 1352 (1994).

Where defendant bought a gun the day before the shooting, he violated a restraining order and went to his wife's home, he shot all six bullets from it at his wife, two to four of which hit her, and it was "purely miraculous" that she was not killed, given the sentencing goals of protecting society along with deterrence, rehabilitation and retribution, a seven-year fixed sentence is not longer than necessary to achieve these goals and was not unreasonable at the time imposed, even though defendant had no previous criminal involvement, and may not have posed a threat to the general public. *State v. Gomez*, 126 Idaho 83, 878 P.2d 782 (1994), cert. denied, 513 U.S. 1005, 115 S. Ct. 522, 130 L. Ed. 2d 427 (1994).

The defendant bears the burden to show that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. Therefore, defendant's sentence was not unduly harsh where defendant had previously been given an opportunity for rehabilitation through the retained jurisdiction but continued his criminal behavior, did not accept responsibility for his conduct, and continued to assert his innocence in the present case and also denied the stabbing for which he had previously been convicted. *State v. Harrison*, 136 Idaho 504, 37 P.3d 1 (Ct. App. 2001).

Solicitation of Attempt.

Where defendant agreed to pay undercover agent \$1,000 to kill a police officer and actually paid him \$250 in "up front" money before being arrested, he could not be convicted for attempted murder since his only actions were those of solicitation by the preparatory act of inciting another to commit the crime and there was no actus reus in actually committing the crime; moreover, the partial payment made was a "slight act" only in furtherance of the solicitation rather than a preparatory act sufficiently proximate to establish an attempt. *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981).

Subornation of Perjury.

Where the evidence did not establish when, if ever, the subornation attempt actually was discontinued, the jury permissibly could have found that the defendant never withdrew his offer to pay whatever the witness wanted for favorable testimony, and discontinuing the attempt, after it had been made and had failed, would not take the case outside of this section, the general attempt statute. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Unsuccessful Attempts.

An unsuccessful attempt to commit extortion by means of a verbal threat, would, in the absence of former law providing for punishment for attempted extortion, be punishable, because there is no distinction between an attempt and an unsuccessful attempt. *State v. Reinoehl*, 70 Idaho 361, 218 P.2d 865 (1949).

Record was clear that defendant intended to commit second-degree murder during his attack on the victim when he attempted but failed to consummate that crime because his gun misfired, the victim escaped, and this section permits prosecution for charge of at-

tempted second-degree murder. *Fenstermaker v. State*, 128 Idaho 285, 912 P.2d 653 (Ct. App. 1995).

Where defendant did not deny that he intended to engage in sexual relations with a minor girl for the purpose of gratifying his sexual desires, which would have amounted to a crime in violation of § 18-1508, or that his actions went beyond mere preparation, the evidence was sufficient to support his conviction for attempted lewd conduct with a minor under 16 years of age; and the statute provided no exception for one who intended to commit a crime but failed because he was unaware of some fact that would have prevented him from completing the intended crime, such as the fact that a police officer was impersonating the teenage girl the defendant thought he was chatting with online; therefore, it had eliminated impossibility as a defense to attempt. *State v. Curtiss*, 138 Idaho 466, 65 P.3d 207 (Ct. App. 2002).

Collateral References. 22 C.J.S., Criminal Law, § 114.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

18-307. Attempt resulting in different crime. — The last two (2) sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed. [I.C., § 18-307, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7236; C.S., § 8608; I.C.A., § 17-307, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-307, as added by 1971, ch.

143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section was added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

18-308. Successive terms of imprisonment. — When any person is convicted of two (2) or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction, in the discretion of the court, may commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be. [I.C., § 18-308, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 6, p. 1102.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 446; R.S., R.C., & C.L., § 7237; C.S., § 8609; I.C.A., § 17-308, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-308, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972,

ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section prior to its repeal by S.L. 1971, ch. 145, § 5.

Cited in: *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978); *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978); *State v. Mendenhall*,

106 Idaho 388, 679 P.2d 665 (Ct. App. 1984); *State v. Haggard*, 110 Idaho 335, 715 P.2d 1005 (Ct. App. 1986); *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986); *State v. Reinke*, 111 Idaho 968, 729 P.2d 443 (Ct. App. 1986); *State v. Maddock*, 113 Idaho 182, 742 P.2d 437 (Ct. App. 1987); *State v. Douglas*, 118 Idaho 622, 798 P.2d 467 (Ct. App. 1990); *State v. Baiz*, 120 Idaho 292, 815 P.2d 490 (Ct. App. 1991); *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991); *State v. Hoffman*, 121 Idaho 131, 823 P.2d 165 (Ct. App. 1991); *State v. Sheahan*, 126 Idaho 111, 878 P.2d 810 (Ct. App. 1994).

ANALYSIS

Common law rule.
Concurrent sentences.
Consecutive sentences.
Consecutive terms.
Consecutive to sentence in another state.
Conviction.
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Common Law Rule.

This section, as amended, was not intended to prohibit consecutive sentences but, on the contrary, the primary effect of the amendment was to reinstate the common-law rule making such sentencing discretionary with the court. *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1977).

This section, as amended, was not intended to abrogate or modify the common-law rule pertaining to consecutive sentences, thereby prohibiting the court from imposing such sentences except in the narrow range of cases meeting the requirements of this section, with respect to cases not falling within the scope of this section. *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1977).

This section, prior to the 1972 amendment, was intended to modify the common-law rule to the extent that courts were mandated to impose consecutive sentences in cases within the scope of the section, although nothing in the section indicated that the legislature intended to deprive the courts of the common-law authority to impose consecutive sentences in other cases. *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1977).

Concurrent Sentences.

The imposition of consecutive sentences is authorized and made discretionary by this section; and, in the exercise of that discretion, a judge's decision to impose concurrent rather than consecutive sentences may properly be viewed as mitigation of punishment. *State v. Brandt*, 109 Idaho 728, 710 P.2d 638.

Consecutive Sentences.

Although the district court failed to specify a minimum period of confinement with regard

to a consecutive, three-year indeterminate sentence imposed on defendant on count two of issuing checks without funds, in addition to a three-year fixed sentence on count one, because the record showed that the court intended to set the minimum period of confinement at zero, the sentence did not violate the requirements of § 19-2513 that the aggregate sentence not exceed the maximum provided by law. *State v. Martinsen*, 128 Idaho 472, 915 P.2d 34 (Ct. App. 1996).

District court abused its discretion by arriving at an unreasonably harsh sentencing structure of incarceration for sixty years without the possibility of parole for defendant's crimes of rape, forcible sexual penetration with a foreign object and robbery; totality of sentences was more than reasonably necessary to accomplish sentencing goals. Consecutive 25-year determinate terms modified to be served concurrently and consecutive 10-year determinate term for robbery modified to be made indeterminate. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

District court properly exercised its discretion in deciding that defendant's sentence for possession of a controlled substance should be served consecutively to sentences for grand theft and burglary where court considered the appropriate goals of sentencing and properly considered defendant's psychological evaluation, the presentence investigation report and defendant's other criminal charges. *State v. Helms*, 130 Idaho 32, 936 P.2d 230 (Ct. App. 1997).

Consecutive sentences for second degree murder of life with 25 years for one murder, and life with 40 years for the other murder, were not excessively harsh given brutality and grizzliness of the crimes, defendant's planning, profit motive, credibility gap and apparent lack of deep remorse. *State v. Li*, 131 Idaho 126, 952 P.2d 1262 (Ct. App. 1998).

Defendant's sentences were modified to remove the provision that his sentences must be served consecutive to his federal probation because under this section a sentence of imprisonment can be made to run consecutive only to an earlier term of imprisonment. The statute does not authorize a sentencing court to order a term of imprisonment to run consecutive to a term of probation. *State v. Bello*, 135 Idaho 442, 19 P.3d 66 (Ct. App. 2001).

The district court had the authority to order that defendant's Idaho sentence would run consecutive to his federal sentence because this section does not limit the district court's authority to impose consecutive sentences, and because defendant's probation was revoked following the grant of a withheld judgment, so the district court had the authority to impose any sentence which might have

been imposed at the time of defendant's original sentencing for grand theft by possession of stolen property. *State v. Murillo*, 135 Idaho 811, 25 P.3d 124 (Ct. App. 2001).

Consecutive Terms.

Sentence to four consecutive terms of imprisonment, of three years each, judgment providing in each of the sentences after the first, that the additional term of three years is "to commence at expiration of term of three years to be served by said defendant this day adjudged against him in the case of United States, criminal number three, against Henry Esmond, or whenever his term of imprisonment after judgment in said case shall cease and be ended for any reason, except by death of said defendant," is definite and certain and valid. *In re Esmond*, 42 F. 827 (D.S.D. 1890).

Where the trial court made a life sentence for robbery consecutive to previous sentences for rape and kidnapping because defendant was a persistent violator of the law and because the robbery conviction was separate and apart from the crimes of rape and kidnapping for which he was then serving sentences, and where the presentence report showed a lengthy criminal record, the district court did not act unreasonably in the structuring of the sentence. *State v. Lloyd*, 104 Idaho 397, 659 P.2d 151 (Ct. App. 1983).

Where, at the time of sentencing for forgery and burglary in Idaho, defendant had pled guilty to both charges and such pleas had been accepted by the court, then at that point, for the purpose of the application of this section, defendant had been convicted on both charges and once one sentence had been imposed, the court was free to exercise its discretion by ordering the second sentence to be served consecutive to the first; however, the district court, in the original judgment and sentence in each case, erred in making each sentence consecutive to the other. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

Where defendant convicted of grand larceny was placed on probation for 14 years, but violated his parole, the district court, upon revoking probation did not have the power to order the sentence originally imposed to be served consecutively to a later sentence imposed for a crime which occurred during the probationary period; the original sentence could only run concurrently with the later sentence. *State v. West*, 105 Idaho 505, 670 P.2d 912 (Ct. App. 1983).

Where the defendant pled guilty to five counts of first degree burglary and was sentenced to an indeterminate term of 15 years on each count, in light of the defendant's prior record and the nature of the present offenses, the trial court did not abuse its discretion in ordering that four of the sentences were to be

served concurrently with each other but consecutive to the first sentence imposed. *State v. Yarbrough*, 106 Idaho 545, 681 P.2d 1020 (Ct. App. 1984).

A sentence within the statutory maximum will not be deemed excessive unless the appellant shows that under any reasonable view of the facts the term of confinement is longer than appears necessary at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution; thus, where the defendant had been convicted of two burglaries in Oregon and was involved in five others in that state during the 18 months preceding his convictions in Idaho, and at the time of his arrest in Idaho, was in violation of the terms of probation he was serving for the State of Oregon, and had been involved in ten burglaries within a relatively short period of time prior to his Idaho convictions, the trial court did not abuse its discretion by making the sentences consecutive. *State v. Mathis*, 107 Idaho 685, 691 P.2d 1300 (Ct. App. 1984).

Where defendant's extensive criminal record indicated his clear propensity to re-offend, even when he had been released on parole under a situation of structured supervision, the trial court did not act unreasonably or abuse its discretion in sentencing defendant to a consecutive rather than a concurrent term of confinement. *State v. Elliott*, 121 Idaho 48, 822 P.2d 567 (Ct. App. 1991).

The sentences imposed by the district court were reasonable and there was no basis to hold that the district court abused its discretion in ordering a grand theft sentence to be served consecutively to one imposed for issuing a check without sufficient funds. *State v. Teske*, 123 Idaho 975, 855 P.2d 60 (Ct. App. 1993).

Consecutive to Sentence in Another State.

The question in deciding whether the sentence for one crime should be consecutive to the sentence for another, is not where the offenses occurred or where the convictions were entered, but whether the nature of the crimes makes cumulative punishment appropriate; thus, the inherent power to impose consecutive sentences includes the authority to impose a sentence consecutive to another sentence imposed by the court of a foreign jurisdiction. *State v. McKaughen*, 108 Idaho 471, 700 P.2d 93 (Ct. App. 1985).

Conviction.

For purposes of this section, "conviction" occurs when the defendant pleads guilty and that plea is accepted by the court. *State v. Chauncey*, 97 Idaho 756, 554 P.2d 934 (1976).

Failure to Appeal.

Where the defendant failed to appeal the denial of his motion to reconsider the sentences, he waived his right to challenge the court's sentencing discretion. *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985).

Modification on Appeal.

The sentence of a defendant, convicted on three separate counts of committing a lewd act upon the body or the bodies of minor children, to ten years imprisonment on each count, which sentences would run consecutively, was unduly harsh and should be modified to provide for such sentences to run concurrently. *State v. Ross*, 92 Idaho 709, 449 P.2d 369 (1968), disapproved on other grounds, *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

Power of Court.

Consecutive sentences were mandatory when called for by the former section, and court had no discretion in this regard. *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969).

Where defendant, who had a prior conviction for lewd and lascivious conduct, was convicted after entering pleas of guilty to three counts of statutory rape, the trial court did not abuse its discretion in denying defendant's application for probation and in imposing three consecutive ten-year prison terms. *State v. Mansfield*, 97 Idaho 138, 540 P.2d 800 (1975).

Where defendant had been advised of a possible three-year maximum sentence on each count of uttering and delivering a check with insufficient funds, the trial court did not err in imposing three concurrent three-year sentences and one consecutive three-year sentence upon defendant's plea of guilty to each count, even though defendant was not specifically advised of the court's discretion to impose consecutive sentences. *State v. Morris*, 97 Idaho 273, 543 P.2d 498 (1975).

Where defendant entered plea of guilty to a charge of burglary on May 12 and then on May 13 entered plea of guilty to a separate charge of burglary of a different business establishment, defendant was thereby convicted of two crimes prior to pronouncement of sentence upon either and the court was empowered to order consecutive sentences. *State v. Chauncey*, 97 Idaho 756, 554 P.2d 934 (1976).

Where judgments of conviction were entered against defendant following pleas of guilty to murder in the second degree, assault with a deadly weapon with intent to murder, and robbery, the trial court did not abuse its discretion in providing that the twenty-year robbery sentence would run consecutively to concurrent sentences of life imprisonment and fourteen (14) years on the murder and assault charges. *State v. Prince*, 97 Idaho 893, 556 P.2d 369 (1976), overruled on other grounds, *State v. Broadhead*, 120 Idaho 141, 814 P.2d 401 (1991).

This section does not limit the authority of the district courts to impose consecutive sentences. *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1977).

Where a convicted forger was not sentenced for that crime until after a subsequent conviction and sentencing for rape, the district court had authority to impose a sentence for the forgery conviction which was to run consecutively to the sentence for rape. *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1977).

Where the four-year sentences imposed on each of two convictions for assault with a deadly weapon were within the statutory limits and the defendant's FBI record indicated that he had committed a number of offenses in various other states, the trial court did not abuse its discretion in ordering that the sentences run consecutively. *State v. Thomas*, 98 Idaho 623, 570 P.2d 860 (1977).

Where a defendant stated that as soon as he got out on parole he would be "as bad or worse" than he was at time of sentencing, the trial court did abuse its discretion in ordering that sentences for robbery and assault with a deadly weapon should run consecutively and commence at the expiration of the 29-year sentence the defendant was then serving. *State v. Jagers*, 98 Idaho 779, 572 P.2d 882 (1977).

The imposition of consecutive sentences is authorized and made discretionary by this section; and, the exercise of that discretion will not be disturbed on appeal unless it has been abused. *State v. Lloyd*, 104 Idaho 397, 659 P.2d 151 (Ct. App. 1983).

A district court possesses inherent authority to impose consecutive sentences for multiple offenses. *State v. Lee*, 111 Idaho 489, 725 P.2d 194 (Ct. App. 1986).

Collateral References. 24 C.J.S., Criminal Law, §§ 1582-1588.

18-309. Computation of term of imprisonment. — In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during

such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term. [I.C., § 18-309, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 7, p. 1102; am. 1975, ch. 201, § 1, p. 559; am. 1996, ch. 168, § 1, p. 552.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7238; C.S., § 8610; I.C.A., § 17-309, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-309, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 8 of S.L. 1972, ch. 381 is compiled herein as § 18-401.

Section 2 of S.L. 1975, ch. 201 provided that the act should take effect on and after July 1, 1975.

Cited in: *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 P. 39 (1888); *State v. Woodman*, 116 Idaho 716, 779 P.2d 30 (Ct. App. 1989); *State v. Drennen*, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992); *State v. Roy*, 127 Idaho 228, 899 P.2d 441 (1995); *State v. Lively*, 131 Idaho 279, 954 P.2d 1075 (Ct. App. 1998).

ANALYSIS

Appeal.

Applicability.

Confinement out-of-state.

Entitlement to credit for time served.

— Federal charges.

— Multiple courts.

Escapee at large.

Lenity.

Presentence confinement.

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Retained jurisdiction confinement.

Sentence reduction.

Appeal.

A claim that credit for prejudgment incarceration was not properly given is a claim that the sentence is illegal, since the sentence would have been imposed in violation of this section, and defendant's motion filed two-and-one-half years after imposition of the judgment was timely and was properly considered on the merits by the district court. *State v. Rodriguez*, 119 Idaho 895, 811 P.2d 505 (Ct. App. 1991).

Applicability.

Where nothing in the record reflected incarceration in Idaho or another state prior to entry of judgment for the offense or for an included offense upon which the appeal was

based, this section did not apply. *State v. West*, 105 Idaho 505, 670 P.2d 912 (Ct. App. 1983).

Confinement Out-of-State.

Probation violator's arrest and confinement in California, before he was delivered to the Idaho authorities, had nothing to do with the Idaho convictions; violator was not entitled to credit for any time spent in California custody, other than the concurrent operation of the Idaho and California sentences after his probation was revoked in Idaho. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

In sentencing, the district court properly allowed credit only for time defendant served in confinement related to this state's charges, and not for time he served in another state on other charges. *State v. Moliga*, 113 Idaho 672, 747 P.2d 81 (Ct. App. 1987).

The contention that delay by this state effectively eliminated any possibility of defendant's prison terms in this state and another state running concurrently and resulting in his gaining release without having to transfer to this state to finish, or to receive parole on, the remaining sentence in this state was without merit, as concurrency of sentences is controlled by statute and is not constitutionally required. *State v. Moliga*, 113 Idaho 672, 747 P.2d 81 (Ct. App. 1987).

Entitlement to Credit for Time Served.

An entitlement to credit under this section depends upon the answer to a simple inquiry: was the defendant's incarceration upon the offense for which he was sentenced? If a particular period of confinement served prior to the imposition of sentence is not attributable to the charge or conduct for which a sentence is to be imposed, the offender is not entitled to credit for such confinement; neither does the sentencing judge err by denying credit under such circumstances. *State v. Hale*, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989).

Where defendant's presentence incarceration was for the offense of intimidating a witness and not for the original offense of theft for which he was ultimately sentenced, district court did not err in refusing to give him credit for the presentence incarceration. *State v. Rodriguez*, 119 Idaho 895, 811 P.2d 505 (Ct. App. 1991).

A defendant is entitled to credit for any period of incarceration occurring prior to entry of judgment, and for any period subse-

quent to the judgment occurring while the defendant still is under the jurisdiction of the court. This section does not specify how the recitation of this credit is to be documented, i.e. by amending the judgment of conviction or by separate order; the district court did not err by implementing that credit by way of an order, rather than an amended judgment, directed to the Board of Correction. *State v. Villarreal*, 126 Idaho 277, 882 P.2d 444 (Ct. App. 1994).

Where defendant's incarceration in the state penitentiary was attributable to his previous conviction for attempted burglary, defendant was not entitled to credit for incarceration that occurred before he was even charged with the infamous crime against nature offense, and such credit was not allowed on resentencing. *State v. Brashier*, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995). See also *State v. Brashier*, 130 Idaho 112, 937 P.2d 424 (Ct. App. 1997).

If a particular period of confinement served prior to the imposition of sentence is not attributable to the charge or conduct for which the new sentence is to be imposed, the offender is not entitled to credit for such confinement. *State v. Brashier*, 130 Idaho 112, 937 P.2d 424 (Ct. App. 1997).

Under the facts of this case, defendant's incarceration was not attributable to the charge of infamous crime against nature until he was initially sentenced for that crime. *State v. Brashier*, 130 Idaho 112, 937 P.2d 424 (Ct. App. 1997).

—Federal Charges.

Defendants were not entitled to credit on their state sentences for the time they spent in the custody of federal authorities awaiting disposition of unrelated federal charges, nor entitled to credit on their state sentences for the time they served on the federal sentences while in the custody of federal authorities. *State v. Dorr*, 120 Idaho 441, 816 P.2d 998 (Ct. App. 1991).

During the time defendants were in the temporary custody of county they were not denied their liberty due to pending state bombing charges, because although they were awaiting disposition of those charges, their liberty already had been denied by the federal courts by virtue of the federal sentences imposed on them; therefore, they were not entitled to credit on their state sentences for the time they served in temporary custody. *State v. Dorr*, 120 Idaho 441, 816 P.2d 998 (Ct. App. 1991).

When a defendant is in violation of his federal supervised release, the resulting imprisonment is attributable to the underlying federal offense; therefore, because the twenty months of federal incarceration was not attributable to the state offense, the district

court properly denied defendant credit for his incarceration in federal prison. *State v. Wilhelm*, 135 Idaho 111, 15 P.3d 824 (Ct. App. 2000).

—Multiple Courts.

A defendant is entitled to have the time he has already served in confinement ascribed to each charge upon which he receives a sentence to be served concurrently, so that if for some reason one of the charges becomes nullified, the defendant is credited for the proper amount of time on the other charge or charges; however, this section does not allow the defendant to receive credit for more time than he has actually been in confinement, and as a result, the Idaho Supreme Court has adopted the policy that a defendant should not be allowed to "pyramid" his time when consecutive sentences on multiple counts are imposed and therefore the same logic applies to concurrent sentences. *State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991).

Escapee at Large.

It is entirely illogical that a prisoner who escapes from incarceration should be permitted accrual of time toward his sentences while he is at large. *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

Lenity.

This section is not ambiguous so as to require the application of the doctrine of lenity. *State v. Hale*, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989).

Presentence Confinement.

The legislative intent concerning time spent in jail prior to sentencing was to credit that time against the sentence; therefore, a person sentenced prior to the enactment of the crediting provision, but after the repeal of the statute which made no allowance for crediting, is entitled to have his sentence reduced by the length of the pre-sentencing incarceration. *State v. Waller*, 97 Idaho 377, 544 P.2d 1147 (1976).

Where defendant was convicted of voluntary manslaughter and sentenced to a term not to exceed ten (10) years, defendant was entitled to credit for time spent in pre-trial confinement while awaiting trial on the homicide charge as distinguished from time in jail attributable to prior burglary conviction. *State v. Beer*, 97 Idaho 684, 551 P.2d 971 (1976).

A defendant who pleaded guilty to two charges of second-degree burglary and was sentenced to two consecutive five-year prison terms could not correct the sentence to apply the 383 days which he had spent in pre-trial confinement to each sentence to give him an aggregate credit of 766 days, since this section does not reveal any legislative intent to per-

mit a defendant to pyramid the credit simply because he was sentenced to consecutive terms for separate crimes. *State v. Hoch*, 102 Idaho 351, 630 P.2d 143 (1981).

This section requires that the sentencing judge give credit for presentence incarceration so as to reduce the convicted person's sentence by the amount of time that person has already spent in confinement, whether or not the person is granted probation. *Law v. Rasmussen*, 104 Idaho 455, 660 P.2d 67 (1983).

Where defendant was given maximum sentence of five years for offenses of drunk driving and marijuana possession, and was not given any reduction for presentence confinement, the term of imprisonment imposed exceeded the statutory maximum. *Law v. Rasmussen*, 104 Idaho 455, 660 P.2d 67 (1983).

The trial court did not err in granting the defendant credit for time served in the county jail prior to conviction solely on the petit theft sentence and not also on the consecutive burglary sentence; the legislature, in enacting this section, did not intend that a defendant be given credit more than once for time spent in the county jail awaiting disposition of multiple and separate charges. *Matthews v. State*, 113 Idaho 83, 741 P.2d 370 (Ct. App. 1987).

Defendant was entitled to credit for all time served prior to being placed on probation. *State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992).

Pursuant to this section, prejudgment "house arrest" does not constitute "incarceration," thus defendant did not receive sentencing credit for days served under house arrest. *State v. Climer*, 127 Idaho 20, 896 P.2d 346 (Ct. App. 1995).

Defendant incarcerated for 104 days prior to entry of judgment was entitled to sentencing credit. *State v. Akin*, — Idaho —, 75 P.3d 214 (Ct. App. 2003).

Probation.

The district judge did not err in refusing to give the defendant credit for time that he

spent on probation before the probation was finally terminated. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).

Time (34 days) which defendant spent in jail, after imposition of sentence, was condition of probation not required to be credited against sentence. *State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992).

Defendant was not entitled to credit for the 182 days served after probation was ordered regardless of whether it is viewed as pre-judgment or post-judgment confinement, because it was a condition of probation and was voluntarily accepted in order to obtain probation and a withheld judgment. *State v. Buys*, 129 Idaho 122, 922 P.2d 419 (Ct. App. 1996).

A defendant who chose, upon a probation violation, to serve 365 days in jail as a term and condition of probation in lieu of the previously suspended sentence of two years was not entitled to a time served credit when the defendant later violated probation again and had the suspended sentence of two years reinstated. *State v. Jakoski*, 132 Idaho 67, 966 P.2d 663 (Ct. App. 1998).

Retained Jurisdiction Confinement.

Time served while under the trial court's retained jurisdiction, pursuant to § 19-2601 should be credited towards sentence under the terms of this section. *State v. Machen*, 100 Idaho 167, 595 P.2d 316 (1979).

Under this section, a defendant is entitled to credit for any period of incarceration occurring prior to entry of judgment and for any period subsequent to the judgment occurring while the defendant still is under the jurisdiction of the court. *State v. Chilton*, 116 Idaho 274, 775 P.2d 166 (Ct. App. 1989).

Sentence Reduction.

The fact that probationer absconded from supervision, failed to notify any authorities of his whereabouts, and then committed a felony in California would preclude any consideration of sentence reduction. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

18-310. Imprisonment — Effect on civil rights and offices. — (1) A sentence of custody to the Idaho state board of correction suspends all the civil rights of the person so sentenced including the right to refuse treatment authorized by the sentencing court, and forfeits all public offices and all private trusts, authority or power during such imprisonment: provided that any such person may bring an action for damages or other relief in the courts of this state or have an action brought against such person; and provided further that any such person may lawfully exercise all civil rights that are not political during any period of parole or probation, except the right to ship, transport, possess or receive a firearm, and the right to refuse treatment authorized by the sentencing court.

(2) Upon final discharge, a person convicted of any Idaho felony shall be restored the full rights of citizenship, except that for persons convicted of treason or those offenses enumerated in paragraphs (a) through (jj) of this subsection the right to ship, transport, possess or receive a firearm shall not be restored. As used in this subsection, "final discharge" means satisfactory completion of imprisonment, probation and parole as the case may be.

- (a) aggravated assault (18-905, 18-915, Idaho Code);
- (b) aggravated battery (18-907, 18-915, Idaho Code);
- (c) assault with intent to commit a serious felony (18-909, 18-915, Idaho Code);
- (d) battery with intent to commit a serious felony (18-911, 18-915, Idaho Code);
- (e) burglary (18-1401, Idaho Code);
- (f) crime against nature (18-6605, Idaho Code);
- (g) domestic battery, felony (18-918, Idaho Code);
- (h) enticing of children, felony (18-1509, Idaho Code);
- (i) forcible sexual penetration by use of a foreign object (18-6608, Idaho Code);
- (j) indecent exposure, felony (18-4116, Idaho Code);
- (k) injury to child, felony (18-1501, Idaho Code);
- (l) intimidating a witness, felony (18-2604, Idaho Code);
- (m) lewd conduct with a minor or child under sixteen (18-1508, Idaho Code);
- (n) sexual abuse of a child under sixteen (18-1506, Idaho Code);
- (o) sexual exploitation of a child (18-1507, Idaho Code);
- (p) felonious rescuing prisoners (18-2501, Idaho Code);
- (q) escape by one charged with, convicted of or on probation for a felony (18-2505, Idaho Code);
- (r) unlawful possession of a firearm (18-3316, Idaho Code);
- (s) degrees of murder (18-4003, Idaho Code);
- (t) voluntary manslaughter (18-4006(1), Idaho Code);
- (u) assault with intent to murder (18-4015, Idaho Code);
- (v) administering poison with intent to kill (18-4014, Idaho Code);
- (w) kidnapping (18-4501, Idaho Code);
- (x) mayhem (18-5001, Idaho Code);
- (y) rape (18-6101, Idaho Code);
- (z) male rape (18-6108, Idaho Code);
- (aa) robbery (18-6501, Idaho Code);
- (bb) ritualized abuse of a child (18-1506A, Idaho Code);
- (cc) cannibalism (18-5003, Idaho Code);
- (dd) felonious manufacture, delivery or possession with the intent to manufacture or deliver, or possession of a controlled or counterfeit substance (37-2732, Idaho Code);
- (ee) trafficking (37-2732B, Idaho Code);
- (ff) threats against state officials of the executive, legislative or judicial branch, felony (18-1353A, Idaho Code);
- (gg) unlawful discharge of a firearm at a dwelling house, occupied building, vehicle or mobile home (18-3317, Idaho Code);

(hh) unlawful possession of destructive devices (18-3319, Idaho Code);
 (ii) unlawful use of destructive device or bomb (18-3320, Idaho Code);
 (jj) attempt (18-306, Idaho Code), conspiracy (18-1701, Idaho Code), or solicitation (18-2001, Idaho Code), to commit any of the crimes described in paragraphs (a) through (ii) of this subsection.

(kk) The provisions of this subsection shall apply only to those persons convicted of the enumerated felonies in paragraphs (a) through (jj) of this subsection on or after July 1, 1991, except that persons convicted of the felonies enumerated in paragraphs (s) and (t) of this subsection, for any degree of murder or voluntary manslaughter, shall not be restored the right to ship, transport, possess or receive a firearm regardless of the date of their conviction if the conviction was the result of an offense committed by use of a firearm.

(3) A person not restored to the civil right to ship, transport, possess or receive a firearm may make application to the commission of pardons and parole to restore the civil right to ship, transport, possess or receive a firearm. The commission shall not accept any such application until five (5) years after the date of final discharge. The commission shall conduct the proceeding upon such application pursuant to rules adopted in accordance with the law. The commission shall not restore the right to ship, transport, possess or receive a firearm to any person convicted of murder in the first degree (18-4003, Idaho Code), murder in the second degree (18-4003, Idaho Code), or any felony enumerated in paragraphs (a) through (jj) of subsection (2) of this section, upon which the sentence was enhanced for the use of a firearm during the commission of said felony.

(4) Persons convicted of felonies in other states or jurisdictions shall be allowed to register and vote in Idaho upon final discharge which means satisfactory completion of imprisonment, probation and parole as the case may be. These individuals shall not have the right restored to ship, transport, possess or receive a firearm, in the same manner as an Idaho felon as provided in subsection (2) of this section. [I.C., § 18-310, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 182, § 1, p. 318; am. 1982, ch. 368, § 6, p. 919; am. 1991, ch. 202, § 1, p. 480; am. 1993, ch. 120, § 2, p. 308; am. 1993, ch. 184, § 1, p. 465; am. 1998, ch. 171, § 1, p. 592; am. 2003, ch. 113, § 1, p. 356; am. 2003, ch. 253, § 1, p. 652; am. 2004, ch. 166, § 1, p. 541.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 153; R.S., R.C., & C.L., § 7239; C.S., § 8611; I.C.A., § 17-310; am. 1947, ch. 47, § 1, p. 51, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-310, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

This section was amended by two 2003 acts

which appear to be compatible and have been compiled together.

The 2003 amendment by ch. 113, § 1, substituted "18-1508" for "18-1508(3), (4), (5) and (6)" in subsection (2)(m).

The 2003 amendment by Ch. 253, § 1, added the exception in subsection (2)(kk).

This section was amended by two 1993 acts — ch. 120, § 2, and ch. 184, § 1, both effective July 1, 1993 — which do not appear to conflict and have been compiled together.

The amendment by ch. 120, § 2, near the beginning of subsection (1) deleted "for any time less than for life" preceding "suspends all

the civil rights"; near the middle of subsection (1) added "provided that any such person may bring an action for damages or other relief in the courts of this state or have an action brought against such person; and" following "power during such imprisonment."; and added "further" preceding "that any such person".

The amendment by ch. 184, § 1, near the middle of subdivision (2)(a) added "unlawful possession of a firearm (18-3316, Idaho Code)," preceding "degrees of murder"; and near the end of subdivision (2)(a) added "trafficking (37-2732B, Idaho Code)," preceding "or any person convicted of an attempt".

Section 5 of S.L. 1982, ch. 368 is compiled as § 18-215.

Section 1 of S.L. 1993, ch. 120 is compiled as § 5-230 and § 3 contained a repeal.

Section 2 of S.L. 1981, ch. 182 read: "This act shall apply prospectively and retroactively to all persons convicted of a felony, except treason." Approved March 31, 1981.

Sec. to sec. ref. This section is referred to in §§ 18-312 and 18-3316.

ANALYSIS

Application.

Inmate business activity.

Restrictions on convicted felons.

Application.

In appeal of habeas corpus petition for relief from convictions for robbery and use of a firearm in the commission of a felony, the defendant failed to support his allegation of

an unconstitutional application of this section with any explanation or argument of how this section was applicable to his case. *Potter v. State*, 114 Idaho 612, 759 P.2d 903 (Ct. App. 1988).

Inmate Business Activity.

The denial of inmate's request to attempt to secure a publisher for his illustrated poetry was constitutional because the regulatory prohibition on inmate business activity is reasonably related to the legitimate prison security interests of the Idaho Department of Corrections. *Freeman v. State*, 134 Idaho 481, 4 P.3d 1132 (Ct. App. 2000).

Restrictions on Convicted Felons.

The restrictions of Rules of Evidence, I.R.E. Rule 609, Criminal Rules, I.C.R. Rules 32(b)(2) and 46(a)(7) and § 19-2514 on convicted felons do not overcome the broad effect of subsection (2) of this section restoring the right of convicted felons upon final discharge, and the attendant provisions of Idaho Const., art. 6, § 3, giving a discharged felon the right to vote and subsection (2) of § 2-209 giving discharged felons the right to serve on a jury. *United States v. Gomez*, 911 F.2d 219 (9th Cir. 1990).

Collateral References. 18 C.J.S., *Convicts*, §§ 3-7.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action. 74 A.L.R.3d 680.

Convict's capacity to make will. 84 A.L.R.3d 479.

18-311. Imprisonment for life — Effect on civil rights. [Repealed.]

Compiler's notes. Former § 18-311, which comprised (I.C., § 18-311, as added by 1972, ch. 336, § 1, p. 844; am. 1982, ch. 368, § 7, p. 919), was repealed by S.L. 1993, ch. 120, § 3, effective July 1, 1993.

A second former section, which comprised Cr. & P. 1864, § 153; R.S., R.C., & C.L.,

§ 7240; C.S., § 8612; I.C.A., § 17-311, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972. A third former section which comprised I.C., § 18-311, as added by 1971, ch. 143, § 1 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-312. Convicts — Capacity as witnesses — Capacity to convey property. — The provisions of the last two (2) preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property. [I.C., § 18-312, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7241; C.S., § 8613; I.C.A., § 17-312, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. 18 C.J.S., *Convicts*, §§ 3-5.

18-313. Protection of person of convict. — The person of a convict sentenced to imprisonment in the state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner, as if he were not convicted or sentenced. [I.C., § 18-313, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7242; C.S., § 8614; I.C.A., § 17-313, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. 60 Am. Jur. 2d, Penal and Correctional Institutions, § 21.

Mistreatment of prisoner as contempt. 40 A.L.R. 1278.

Prison conditions as amounting to cruel and unusual punishment. 51 A.L.R.3d 111.

18-314. Property of convict not forfeited. — No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this state, in the nature of a deodand, or where any person shall flee from justice, are abolished. [I.C., § 18-314, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7243; C.S., § 8615; I.C.A., § 17-314, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. 18 C.J.S., Convicts, § 4.

18-315. Omission of public duty. — Every wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor. [I.C., § 18-315, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6534; C.S., § 8202; I.C.A., § 17-1025, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336 in the same words as the section prior to its repeal.

Collateral References. 63A Am. Jur. 2d, Public Officers and Employees, § 412.

Conduct contemplated by statute which makes neglect of duty by public officer or employee a punishable offense. 134 A.L.R. 1250.

18-316. Neglect of duty by public administrator. [Repealed.]

Compiler's notes. Former § 18-316, which comprised I.C., § 18-316, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 131, § 7, effective July 1, 1994.

Another former § 18-316, which comprised 1881, p. 292, § 5; R.S., R.C., & C.L., § 6511;

C.S., § 8179; I.C.A., § 17-1002, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-317. Punishment of offenses for which no penalty is fixed. — When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor. [I.C., § 18-317, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6535; C.S., § 8203; I.C.A., § 17-1026, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Imprisonment for nonpayment of fine, § 18-303.

Punishment for common law offenses, § 18-303.

Punishment for felony where punishment not prescribed, § 18-112.

Punishment for misdemeanor where punishment not prescribed, § 18-113.

CHAPTER 4

ABANDONMENT OR NONSUPPORT OF WIFE OR CHILDREN

SECTION.	SECTION.
18-401. Desertion and nonsupport of children or spouse.	18-404. Proceedings upon violation of provisional order — Disposition of proceeds of forfeited recognizance.
18-402. Orders providing for children and wife upon violation of preceding section.	18-405. Rules of evidence.
18-403. Abandonment or nonsupport prima facie wilful.	18-406 — 18-410. [Repealed.]

18-401. Desertion and nonsupport of children or spouse. — Every person who:

- (1) Having any child under the age of eighteen (18) years dependent upon him or her for care, education or support, deserts such child in any manner whatever, with intent to abandon it;
- (2) Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children, or ward or wards; provided however, that the practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to be a violation of the duty of care to such child;
- (3) Having sufficient ability to provide for a spouse’s support, or who is able to earn the means for such spouse’s support, who willfully abandons and leaves a spouse in a destitute condition, or who refuses or neglects to provide such spouse with necessary food, clothing, shelter, or medical attendance, unless by the spouse’s misconduct he or she is justified in abandoning him or her;
- Shall be guilty of a felony and shall be punishable by a fine of not more than five hundred dollars (\$500), or by imprisonment for not to exceed fourteen (14) years, or both. [I.C., § 18-401, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 8, p. 1089; am. 2000, ch. 294, § 1, p. 1008.]

Compiler’s notes. A former section, which comprised 1923, ch. 190, § 1, p. 297; am. 1931, ch. 112, § 1, p. 193; I.C.A., § 17-1901; am. 1953, ch. 34, § 1, p. 51, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-401, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 7 of S.L. 1972, ch. 381 is compiled as § 18-309 and § 9 repealed § 18-1203.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Adoption, § 16-1501, et seq.

Contributing to the delinquency of a minor, § 44-1307.

Employment or permitting of a child in

violation of child labor laws, § 44-1305.

Falsely swearing to child's age, perjury, § 44-1305.

Intoxicants, disposing to a minor, felony, § 23-603.

Mandatory income withholding for child support, §§ 32-1201 — 32-1217.

Necessaries, parents liability for, § 32-1003.

Parent and child, §§ 32-1001 — 32-1008A.

Parent and child relationship, proceedings for termination of, disclosure of information and records a misdemeanor, § 16-2013.

Parent responsibility act, § 32-1301.

Prostitution, sending minor to house of or employing minor therein a misdemeanor, § 44-1307.

Reciprocal duties of support, § 32-1002.

Theatrical performance, employment of a child in, misdemeanor, § 44-1306.

Uniform child custody jurisdiction and enforcement act, §§ 32-11-101 — 32-11-405.

Cited in: State, Dep't of Health & Welfare ex rel. Bowler v. Bowler, 116 Idaho 940, 782 P.2d 63 (Ct. App. 1989).

ANALYSIS

Discretion of court.

Duty to support child.

Evidence.

In general.

Jurisdiction.

Prima facie case.

Wilfulness.

Discretion of Court.

In a prosecution of defendant for nonsupport of his minor children, the trial court did not abuse its discretion in allowing the complaining witness to sit at the counsel table with the prosecuting attorney. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Duty to Support Child.

It is the obligation of the father to support his minor child. In *re Wilson's Guardianship*, 68 Idaho 486, 199 P.2d 261 (1948).

Upon entering a decree for divorce to the wife, the trial court had authority to order the husband, who had paid nothing for the support of his child between the separation of the parties and the trial on the ground that it was not his child, to pay a certain sum to the wife for support of the child in such interval. *Voss v. Voss*, 91 Idaho 17, 415 P.2d 303 (1966).

Evidence.

In the prosecution of defendant for nonsupport of his three minor children, testimony of a state's witness that he had called an insurance company and had been told by an anonymous agent that defendant had received payment on a life insurance policy after the death of an older son was hearsay and admission of the testimony over defendant's objec-

tion was error. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

In General.

The obligation of a father to support his children is statutory; therefore, it stands on an equal with a claim reduced to judgment. *Petty v. Petty*, 66 Idaho 717, 168 P.2d 818 (1946).

Paragraph (2) does not require that a valid child support order be the basis for a criminal prosecution and such prosecution is not contingent on the defendant's marital status. *State v. Beorchia*, 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001).

Jurisdiction.

Where defendant was residing in Nevada at the times relevant to a charge of nonsupport of his minor children, the Idaho court had jurisdiction to try defendant. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Prima Facie Case.

Since wilfulness of a failure to provide support for minor children is presumed by statute (§ 18-403), in order to establish a prima facie case, the state need only establish the venue of the action, its timeliness, and proof of failure to provide. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Wilfulness.

The connection between defendant's failure to support his minor children and the ultimate fact of wilfulness of such nonsupport was sufficient to justify a jury instruction on the presumption of wilfulness; but, where defendant challenged the wilfulness of his failure to support, the factual issues of whether defendant had raised a reasonable doubt as to his ability to provide and the wilful nature of his nonsupport were for resolution by the jury. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Collateral References. 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 1 and 2.

41 C.J.S., Husband and Wife, §§ 242-246.

67A C.J.S., Parent and Child, § 1 et seq.

Criminal responsibility of husband for abandonment or nonsupport of wife who refuses to live with him. 3 A.L.R. 107; 8 A.L.R. 1314.

Aiding and abetting abandonment of child, criminal responsibility. 5 A.L.R. 786; 74 A.L.R. 1110; 131 A.L.R. 1322.

Vagrancy, abandonment of wife or child as. 14 A.L.R. 1485.

Adultery of wife as affecting criminal charge of abandonment against husband. 17 A.L.R. 999.

Criminal liability of father for failure to support child as affected by decree of divorce or separation. 23 A.L.R. 864.

"Infamous offense," failure to support wife

or children as, within constitutional or statutory provision in relation to indictment or presentment by grand jury. 24 A.L.R. 1014.

Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution. 24 A.L.R. 1075.

Illegitimate child as within statute relating to duty to support child. 30 A.L.R. 1075; 99 A.L.R.2d 746.

Extent or character of support contemplated by statute making nonsupport of wife offense. 36 A.L.R. 866.

Adopted child, abandonment of. 44 A.L.R. 820.

Power to make abandonment of family a criminal offense. 48 A.L.R. 1193.

Child's possession of independent means, or

fact that other persons supply his needs or are able to do so, as affecting criminal responsibility of parent under desertion or nonsupport statute. 131 A.L.R. 482.

Criminal liability of father for desertion of or failure to support child where divorce decree awards custody to another. 73 A.L.R.2d 960.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child. 53 A.L.R.3d 566.

Who has custody or control of child within terms of penal statute punishing cruelty or neglect by one having custody or control. 75 A.L.R.3d 933.

18-402. Orders providing for children and wife upon violation of preceding section. — In any case enumerated in the previous section, the court may render one of the following orders:

1. Should a fine be imposed it may be directed by the court to be paid in whole or in part to the wife, or to the guardian or to the custodian of the child or children, or to an individual appointed by the court as trustee.

2. Before trial, or after conviction, with the consent of the defendant, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly during such time as the court may direct, to the wife or to the guardian, or custodian of the minor child or children, or to an individual appointed by the court and to release the defendant from custody or probation during such time as the court may direct upon his or her entering into a recognizance, with or without sureties, in such sum as the court may direct. The condition of the recognizance to be such that if the defendant shall make his or her appearance in court whenever ordered to do so, and shall further comply with the terms of the order and of any subsequent modification thereof, then the recognizance shall be void, otherwise to remain in full force and effect.

3. When conviction is had and a sentence to imprisonment in the county jail is imposed, the court may direct that the person so convicted shall be compelled to work upon the public roads or highways or any other public work in the county where such conviction is had, during the time of such sentence. And it shall be the duty of the county commissioners or of the highway district board within the county where such conviction and sentence is had and where such work is performed by persons under sentence to the county jail to allow an order of payment out of the current fund or maintenance road fund, to the wife, or to the guardian, or custodian of the child or children, or to an individual appointed by the court as trustee, at the end of each calendar month, for the support of such wife, or child or children, ward or wards, a sum not to exceed one and fifty one-hundredths dollars for each day's work of such person. [I.C., § 18-402, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1923, ch. 190, § 2, p. 297; I.C.A., § 17-1902, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-402, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Wages of parents, assignment for child support, § 8-704.

Cited in: *State v. Brower*, 122 Idaho 450, 835 P.2d 685 (Ct. App. 1992).

Discretion of Court.

Although this section provides the sentencing court with sentencing alternatives to imprisonment in cases involving felony nonsupport of children, these alternatives are discretionary in nature, and a sentencing court is not required to recite or check off the sentencing guidelines during sentencing, nor is it even required to give its reasons for imposing the sentence. *State v. Beorchia*, 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001).

18-403. Abandonment or nonsupport prima facie wilful. — Proof of the abandonment or nonsupport of a wife, or the desertion of a child or children, ward or wards, or the omission to furnish necessary food, clothing, shelter, or medical attendance for a child or children, ward or wards, is prima facie evidence that such abandonment or nonsupport, or omission to furnish food, clothing, shelter, or medical attendance is wilful. [I.C., § 18-403, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1923, ch. 190, § 3, p. 297; I.C.A., § 17-1903, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-403, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

ANALYSIS

Jury issue.

Prima facie case.

Jury Issue.

Where a defendant challenged the wilful-

ness of his failure to support, the factual issues of whether defendant had raised a reasonable doubt as to his ability to provide and the wilful nature of his nonsupport were for resolution by the jury. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Prima Facie Case.

Since this section establishes the inference of the wilful nature of a failure to provide support for minor children, in order to establish a prima facie case the state need only establish the venue of the action, its timeliness, and proof of failure to provide. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

18-404. Proceedings upon violation of provisional order — Disposition of proceeds of forfeited recognizance. — If the court be satisfied by the information or complaint and due proof, under oath, that at any time the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original indictment or information, or sentence him under the original conviction, or enforce the original sentence, as the case may be. In case of forfeiture of a recognizance and enforcement thereof by execution, the sum recovered may, in the discretion of the court, be paid in whole or in part to the wife or to the guardian or custodian of the minor child or children. [I.C., § 18-404, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1923, ch. 190, § 4, p. 297; I.C.A.,

§ 17-1904, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and sub-

stituted therefor was a section comprising I.C., § 18-404, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

18-405. Rules of evidence. — No other evidence shall be required to prove marriage of such husband and wife, or that such person is the lawful father or mother of such child or children, than is or shall be required to prove such facts in a civil action. In all prosecutions under this act, any existing provisions of law prohibiting the disclosure of confidential communications between husband and wife, shall not apply, and both husband and wife shall be competent witnesses to testify for or against each other to any and all relevant matters, including the fact of such marriage and the parentage of such child or children. Proof of the desertion of such wife, child or children in destitute or necessitous circumstances or of neglect to furnish such wife, child, or children necessary and proper food, clothing or shelter is prima facie evidence that such desertion or neglect is wilful. [I.C., § 18-405, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1923, ch. 190, § 5, p. 297; I.C.A., § 17-1905, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-405, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 145, § 5.

Cross ref. Generally husband or wife may not testify against one another, § 19-3002.

ANALYSIS

Jury issue.

Prima facie case.

Jury Issue.

Where a defendant challenged the wilfulness of his failure to support, the factual issues of whether defendant had raised a reasonable doubt as to his ability to provide and the wilful nature of his nonsupport were for resolution by the jury. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Prima Facie Case.

Since this section establishes the inference of the wilful nature of a failure to provide support for minor children, in order to establish a prima facie case the state need only establish the venue of the action, its timeliness, and proof of failure to provide. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

18-406 — 18-410. Responsibility of persons for criminal conduct — Determination. [Repealed.]

Compiler's notes. These sections, comprising I.C., §§ 18-406 — 18-410, as added by

1971, ch. 143, § 1, p. 630 were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

CHAPTER 5

ABDUCTION

SECTION.

18-501 — 18-506. [Repealed.]

18-501. Abduction for marriage or defilement. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-501, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1981, ch. 319, § 1.

A former § 18-501, which comprised Cr. & P. 1864, § 53; R.S., R.C., & C.L., § 6769; C.S., § 8266; I.C.A., § 17-1605, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and substituted therefor was a section comprising I.C., § 18-501, as added by 1971, ch. 143, § 1. However, the latter section was

repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-502 — 18-506. Criminal solicitation and conspiracy — Possessing instruments of crime — Weapons. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-502 — 18-506, as added

by 1971, ch. 143, § 1, p. 630, were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

CHAPTER 6

ABORTION AND CONTRACEPTIVES

SECTION.

- 18-601. Interpretation of state statutes and the state constitution.
- 18-602. Legislative findings and intent.
- 18-603. Advertising medicines or other means for preventing conception, or facilitating miscarriage or abortion.
- 18-604. Definitions.
- 18-605. Unlawful abortions — Procurement of — Penalty.
- 18-606. Unlawful abortions — Accomplice or accessory — Submitting to — Penalty.
- 18-607. Abortifacients — Unauthorized sale.
- 18-608. Certain abortions permitted — Conditions and guidelines.

SECTION.

- 18-608A. Persons authorized to perform abortions.
- 18-609. Physicians and hospitals not to incur civil liability — Consent to abortion — Notice.
- 18-609A. Consent required for abortions for minors.
- 18-610. Refusal to consent by pregnant woman — Effect.
- 18-611. [Repealed.]
- 18-612. Refusal to perform abortions — Physicians and hospitals not liable.
- 18-613. Partial-birth abortions prohibited.
- 18-614. Defenses to prosecution.
- 18-615. Severability.

18-601. Interpretation of state statutes and the state constitution. — The supreme court of the United States having held in the case of “Planned Parenthood v. Casey” that the states have a “profound interest” in preserving the life of preborn children, Idaho hereby expresses the fundamental importance of that “profound interest” and it is hereby declared to be the public policy of this state that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion. [I.C., § 18-601, as added by 2001, ch. 273, § 1, p. 996.]

Compiler's notes. Former § 18-601 was amended and redesignated as § 18-602 by S.L. 2001, ch. 273, § 2.

Planned Parenthood of Southeastern PA v.

Casey, referenced in this section, is reported at 505 U.S. 833, 120 L.Ed.2d 674, 112 S.Ct. 2791 (1992).

- 18-602. Legislative findings and intent.** — (1) The legislature finds:
- (a) That children have a special place in society that the law should reflect;
 - (b) That minors too often lack maturity and make choices that do not include consideration of both immediate and long-term consequences;
 - (c) That the medical, emotional and psychological consequences of abortion and childbirth are serious and can be lasting, particularly when the patient is immature;
 - (d) That the capacity to become pregnant and the capacity for mature

judgment concerning the wisdom of bearing a child or of having an abortion are not necessarily related;

(e) That parents, when aware that their daughter is pregnant or has had an abortion are in the best position to ensure that she receives adequate medical attention during her pregnancy or after her abortion;

(f) That except in rare cases, parents possess knowledge regarding their child which is essential for a physician to exercise the best medical judgment for that child;

(g) That when a minor is faced with the difficulties of an unplanned pregnancy, the best interests of the minor are always served when there is careful consideration of the rights of parents in rearing their child and the unique counsel and nurturing environment that parents can provide;

(h) That informed consent is always necessary for making mature health care decisions.

(2) It is the intent of the legislature in enacting section 18-609A, Idaho Code, to further the following important and compelling state interests recognized by the United States supreme court in:

(a) Protecting minors against their own immaturity;

(b) Preserving the integrity of the family unit;

(c) Defending the authority of parents to direct the rearing of children who are members of their household;

(d) Providing a pregnant minor with the advice and support of a parent during a decisional period;

(e) Providing for proper medical treatment and aftercare when the life or physical health of the pregnant minor is at serious risk in the rare instance of a sudden and unexpected medical emergency. [I.C., § 18-601, as added by 2000, ch. 7, § 1, p. 10; am. and redesign. 2001, ch. 273, § 2, p. 996.]

Compiler's notes. This section was formerly compiled as § 18-601.

A former section, which comprised Cr. & P. 1864, § 42; R.S., R.C., & C.L., § 6794; C.S., § 8281; I.C.A., § 17-1810, was transferred to I.C., § 18-1505, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-601, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972, and substituted therefor was a section comprising I.C., § 18-601, as added by 1972, ch. 336, § 1, p. 844, which was repealed in turn by S.L. 1973, ch. 197, § 2. For present law see § 18-605.

A former section, which comprised R.S.,

R.C., & C.L., § 6795; C.S., § 8282; I.C.A., § 17-1811, was transferred to I.C., § 18-1506, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-602, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972, and substituted therefor was a section comprising I.C., § 18-602, as added by 1972, ch. 336, § 1, p. 844, which was repealed in turn by S.L. 1973, ch. 197, § 2. For present law see § 18-606.

Section 2 of S.L. 2000, ch. 7 is compiled as § 18-604.

Section 3 of S.L. 2001, ch. 273 is compiled as § 56-209c.

18-603. Advertising medicines or other means for preventing conception, or facilitating miscarriage or abortion. — Every person, except licensed physicians of this state and those licensed or registered health care providers hereinafter referred to acting under their direct supervision or medical order, who wilfully publishes any notice or adver-

tisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise to assist in the accomplishment of any such purpose, is guilty of a felony. A licensed physician or licensed or registered health care provider acting at his direction or medical order may lawfully provide examinations, prescriptions, devices and informational materials regarding prevention of conception to any person requesting the same who, in the good faith judgment of the physician or such provider, is sufficiently intelligent and mature to understand the nature and significance thereof. [I.C., § 18-603, as added by 1972, ch. 336, § 1 p. 844; am. 1974, ch. 69, § 1, p. 1150.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6843; C.S., § 8306; I.C.A., § 17-2103, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-603, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should

take effect on and after April 1, 1972.

Sec. to sec. ref. This section is referred to in § 18-613.

Cross ref. Contraceptive and prophylactics, violation of law governing, misdemeanor, § 39-804.

Penalty for felony when not otherwise provided, § 18-112.

Collateral References. 1 Am. Jur. 2d, Abortion, § 12.

1 C.J.S., Abortion, §§ 1—3.

Validity of regulations as to contraceptives or dissemination of birth control information. 96 A.L.R.2d 955.

18-604. Definitions. — As used in this act:

(1) "Abortion" means the intentional termination of human pregnancy for purposes other than delivery of a viable birth.

(2) "First trimester of pregnancy" means the first thirteen (13) weeks of a pregnancy.

(3) "Hospital" means an acute care, general hospital in this state, licensed as provided in chapter 13, title 39, Idaho Code.

(4) "Informed consent" means a voluntary and knowing decision to undergo a specific procedure or treatment. To be voluntary, the decision must be made freely after sufficient time for contemplation and without coercion by any person. To be knowing, the decision must be based on the physician's accurate and substantially complete explanation of each fact pertinent to making the decision. Facts pertinent to making the decision shall include, but not be limited to:

(a) A description of any proposed treatment or procedure;

(b) Any reasonably foreseeable complications and risks to the patient from such procedure, including those related to future reproductive health; and

(c) The manner in which such procedure and its foreseeable complications and risks compare with those of each readily available alternative to such procedure, including childbirth and adoption.

The physician must provide the information in terms which can be understood by the person making the decision, with consideration of age, level of maturity and intellectual capability.

(5) "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(6) "Second trimester of pregnancy" means that portion of a pregnancy following the thirteenth week and preceding the point in time when the fetus becomes viable, and there is hereby created a legal presumption that the second trimester does not end before the commencement of the twenty-fifth week of pregnancy, upon which presumption any licensed physician may proceed in lawfully aborting a patient pursuant to section 18-608, Idaho Code, in which case the same shall be conclusive and un rebuttable in all civil or criminal proceedings.

(7) "Third trimester of pregnancy" means that portion of a pregnancy from and after the point in time when the fetus becomes viable.

(8) Any reference to a viable fetus shall be construed to mean a fetus potentially able to live outside the mother's womb, albeit with artificial aid. [1973, ch. 197, § 3, p. 442; am. 2000, ch. 7, § 2, p. 10.]

Legislative Intent. Section 1 of S.L. 1973, ch. 197, read: "The Supreme Court of the United States having ruled that the several states lack the power to prohibit the practice of abortion or the commission thereof in the fashion previously prescribed by the criminal code of this state, and having specifically stricken down as violative of the constitutional right of privacy of the pregnant mother, criminal and related abortion statutes of the states of Georgia and Texas but reserving to the state the power to provide some standards and restrictions if they deem it appropriate to do so, and appearing that, in the event of the failure of this state to enact legislation regulating and proscribing abortion under such circumstances as it is within the power of the state so to regulate and proscribe, there is an immediate danger of widespread and undesirable abortion practices within the state, the legislature deems it necessary and in the public interest to provide standards and regulations and to define crimes with respect to the general subject of abortion in the interest of filling the voids and resolving the ambiguities generated by the said recent decisions in the Texas and Georgia cases, and in the furtherance and preservation of the public policy of this state in such matters. Without condoning or approving abortion or the liberalization of abortion laws generally, nonetheless by this act the legislature of the state of Idaho does express the policy of the state to regulate and to prescribe the standards with respect to the type of judgment, practice and conduct that is implicit in the performance of

the abortions or the submission thereto."

Compiler's notes. A former section, which comprised I.C., § 18-604, as added by 1971, ch. 143, § 1, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

The words "this act" refer to S.L. 1973, ch. 197, compiled as §§ 18-604 — 18-608, 18-609, 18-610, and 18-612.

Section 2 of S.L. 1973, ch. 197 repealed §§ 18-601 and 18-602, Idaho Code.

Sections 1 and 3 of S.L. 2000, ch. 7 are compiled as §§ 18-602 and 18-608A, respectively.

Sec. to sec. ref. This section is referred to in § 18-613.

Cross ref. Department of Health and Welfare funds used for abortion, when, § 56-209c.

Induced abortion, reporting of to vital statistics unit, § 39-261.

Opinions of Attorney General. The definition of viability in § 18-604 departs from the definition provided by the United States Supreme Court. Should a case arise under this portion of the statute, a court might conclude there is a difference between "a realistic possibility" of maintaining and nourishing a life outside the womb (the Supreme Court definition) and a "potential" ability to live outside the womb (the § 18-604 definition). A broader definition of viability which correspondingly narrows or restricts the woman's ability to obtain an abortion prior to viability conflicts with the Supreme Court's past ruling. OAG 98-1.

Collateral References. 1 C.J.S., Abortion, §§ 1—12.

18-605. Unlawful abortions — Procurement of — Penalty. —

(1) Every person not licensed or certified to provide health care in Idaho who, except as permitted by this chapter, provides, supplies or administers

any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to cause or perform an abortion shall be guilty of a felony and shall be fined not to exceed five thousand dollars (\$5,000) and/or imprisoned in the state prison for not less than two (2) and not more than five (5) years.

(2) Any person licensed or certified to provide health care pursuant to title 54, Idaho Code, and who, except as permitted by the provisions of this chapter, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent to cause or perform an abortion shall:

- (a) For the first violation, be subject to professional discipline and be assessed a civil penalty of not less than one thousand dollars (\$1,000), payable to the board granting such person's license or certification;
- (b) For the second violation, have their license or certification to practice suspended for a period of not less than six (6) months and be assessed a civil penalty of not less than two thousand five hundred dollars (\$2,500), payable to the board granting such person's license or certification; and
- (c) For each subsequent violation, have their license or certification to practice revoked and be assessed a civil penalty of not less than five thousand dollars (\$5,000), payable to the board granting such person's license or certification.

(3) Any person who is licensed or certified to provide health care pursuant to title 54, Idaho Code, and who knowingly violates the provisions of this chapter is guilty of a felony punishable as set forth in subsection (1) of this section, separate from and in addition to the administrative penalties set forth in subsection (2) of this section. [1973, ch. 197, § 4, p. 442; am. 2001, ch. 277, § 1, p. 1000.]

Compiler's notes. A former section, which comprised I.C., § 18-605, as added by 1971, ch. 143, § 1, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Section 2 of S.L. 2001, ch. 277 is compiled as § 18-609A.

Sec. to sec. ref. This section is referred to in §§ 18-608 and 18-613.

In General.

Where attorney general's short title failed to capture the distinctive characteristics of the proposed initiative in that it inaccurately informed voters that the purpose of the initiative was to create a law prohibiting post-viability abortions, with exceptions, but, in fact, did not create a new law but rather deleted an exception to the existing ban on post-viability abortions, added a new exception to the ban, created new civil causes of action, new criminal liabilities and repealed existing criminal penalties against pregnant women who violated the chapter, the short title was not the product of an analysis of the initiative that distinguished the initiative from existing abortion laws and, as such, it

required redrafting. *Buchin v. Lance*, 128 Idaho 266, 912 P.2d 634 (1995).

Opinions of Attorney General. The provisions of §§ 31-2227, 31-2604 and 50-208A are fully applicable to the provisions of this section, § 18-606 and § 18-607 making certain violations criminal offenses. Thus, prosecutions for unlawful abortions under this section and § 18-606, which are declared to be felonies, would be the responsibility of the prosecuting attorney. OAG 93-1.

Collateral References. 1 Am. Jur. 2d, Abortion, §§ 1, 82-96.

1 C.J.S., Abortion, §§ 1—12.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 A.L.R.2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Availability of defense of entrapment where accused denies participating at all in offense. 61 A.L.R.2d 677.

Right of action for injury to or death of woman who consented to illegal abortion. 36 A.L.R.3d 630.

Entrapment defense in sex prosecutions. 12 A.L.R.4th 413.

18-606. Unlawful abortions — Accomplice or accessory — Submitting to — Penalty. — Except as permitted by this act: (1) Every person who, as an accomplice or accessory to any violation of section 18-605, induces or knowingly aids in the production or performance of an abortion; and

(2) Every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars (\$5,000) and/or imprisoned in the state prison for not less than one (1) and not more than five (5) years; provided, however, that no hospital, nurse, or other health care personnel shall be deemed in violation of this section if in good faith providing services in reliance upon the directions of a physician or upon the hospital admission of a patient for such purpose on the authority of a physician. [1973, ch. 197, § 5, p. 442.]

Compiler's notes. A former section, which comprised I.C., § 18-606, as added by 1971, ch. 143, § 1, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

The words "this act" refer to S.L. 1973, ch. 197 compiled herein as §§ 18-604 — 18-608, 18-609, 18-610, and 18-612.

Sec. to sec. ref. This section is referred to in §§ 18-608 and 18-613.

In General.

Where attorney general's short title failed to capture the distinctive characteristics of the proposed initiative^{fn} that it inaccurately informed voters that the purpose of the initiative was to create a law prohibiting post-viability abortions, with exceptions, but, in fact, did not create a new law but rather deleted an exception to the existing ban on

post-viability abortions, added a new exception to the ban, created new civil causes of action, new criminal liabilities and repealed existing criminal penalties against pregnant women who violated the chapter, the short title was not the product of an analysis of the initiative that distinguished the initiative from existing abortion laws and, as such, it required redrafting. *Buchin v. Lance*, 128 Idaho 266, 912 P.2d 634 (1995).

Opinions of Attorney General. The provisions of §§ 31-2227, 31-2604 and 50-208A are fully applicable to the provisions of § 18-605, this section and § 18-607 making certain violations criminal offenses. Thus, prosecutions for unlawful abortions under Idaho Code § 18-605 and this section, which are declared to be felonies, would be the responsibility of the prosecuting attorney. OAG 93-1.

18-607. Abortifacients — Unauthorized sale. — A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(1) The sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(2) The same is made upon prescription or order of a physician; or

(3) The possession is with intent to sell as authorized in paragraphs (1) and (2) of this section; or

(4) The advertising is addressed to persons named in paragraph (1) of this section and confined to trade or professional channels not likely to reach the general public. [1973, ch. 197, § 6, p. 442.]

Compiler's notes. A former section, which comprised I.C., § 18-607, as added by 1971,

ch. 143, § 1, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Opinions of Attorney General. The provisions of §§ 31-2227, 31-2604 and 50-208A are fully applicable to the provisions of §§ 18-605, 18-606 and this section making certain violations criminal offenses. Thus, prosecu-

tions for unlawful abortions under Idaho Code §§ 18-605 and 18-606, which are declared to be felonies, would be the responsibility of the prosecuting attorney. OAG 93-1.

18-608. Certain abortions permitted — Conditions and guidelines. — The provisions of sections 18-605 and 18-606 shall not apply to and neither this act, nor other controlling rule of Idaho law, shall be deemed to make unlawful an abortion performed by a physician if:

(1) When performed upon a woman who is in the first trimester of pregnancy, the same is performed following the attending physician's consultation with the pregnant patient and a determination by the physician that such abortion is appropriate in consideration of such factors as in his medical judgment he deems pertinent, including, but not limited to physical, emotional, psychological and/or familial factors, that the child would be born with some physical or mental defect, that the pregnancy resulted from rape, incest or other felonious intercourse, and a legal presumption is hereby created that all illicit intercourse with a girl below the age of sixteen (16) shall be deemed felonious for purposes of this section, the patient's age and any other consideration relevant to her well-being or directly or otherwise bearing on her health and, in addition to medically diagnosable matters, including but not limited to such factors as the potential stigma of unwed motherhood, the imminence of psychological harm or stress upon the mental and physical health of the patient, the potential stress upon all concerned of an unwanted child or a child brought into a family already unable, psychologically or otherwise, to care for it, and/or the opinion of the patient that maternity or additional offspring probably will force upon her a distressful life and future; the emotional or psychological consequences of not allowing the pregnancy to continue, and the aid and assistance available to the pregnant patient if the pregnancy is allowed to continue; provided, in consideration of all such factors, the physician may rely upon the statements of and the positions taken by the pregnant patient, and the physician shall not be deemed to have held himself out as possessing special expertise in such matters nor shall he be held liable, civilly or otherwise, on account of his good faith exercise of his medical judgment, whether or not influenced by any such nonmedical factors. Abortions permitted by this subsection shall only be lawful if and when performed in a hospital or in a physician's regular office or a clinic which office or clinic is properly staffed and equipped for the performance of such procedures and respecting which the responsible physician or physicians have made satisfactory arrangements with one or more acute care hospitals within reasonable proximity thereof providing for the prompt availability of hospital care as may be required due to complications or emergencies that might arise.

(2) When performed upon a woman who is in the second trimester of pregnancy, the same is performed in a hospital and is, in the judgment of the attending physician, in the best medical interest of such pregnant woman, considering those factors enumerated in subsection (1) of this section and such other factors as the physician deems pertinent.

(3) When performed upon a woman who is in the third trimester of pregnancy the same is performed in a hospital and, in the judgment of the attending physician, corroborated by a like opinion of a consulting physician concurring therewith, either is necessary for the preservation of the life of such woman or, if not performed, such pregnancy would terminate in birth or delivery of a fetus unable to survive. Third trimester abortions undertaken for preservation of the life of a pregnant patient, as permitted by this subsection, shall, consistent with accepted medical practice and with the well-being and safety of such patient, be performed in a manner consistent with preservation of any reasonable potential for survival of a viable fetus. [1973, ch. 197, § 7, p. 442.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 197 compiled herein as §§ 18-604 — 18-608, 18-609, 18-610, and 18-612.

Sec. to sec. ref. This section is referred to in §§ 18-604 and 18-609.

Opinions of Attorney General. The legislative intent and purpose behind § 18-609 was to provide legal protection from civil liability for physicians performing abortions in compliance with both this section and § 18-609. Further, it was not the intent and purpose of the legislature to impose criminal sanctions against a physician for non-compliance with § 18-609. OAG 93-1.

The United States Supreme Court's recent rejection of *Roe v. Wade's* (410 U.S. 113 (1973)) trimester approach to abortion issues in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) does not affect the constitutionality of this section. However, regardless of whether a trimester or viability approach is used, subdivision (2) of this section, which requires that second-tri-

mester abortions be performed in a hospital, is unconstitutional. OAG 93-1.

While this section contains an exception to the third-trimester abortion prohibition if the life of the mother is endangered, it does not, however, contain an exception if her health is jeopardized. The omission of any health exception in Idaho's ban on third-trimester abortions creates a constitutional problem. OAG 98-1.

The definition of viability in § 18-604 departs from the definition provided by the United States Supreme Court. Should a case arise under this portion of the statute, a court might conclude there is a difference between "a realistic possibility" of maintaining and nourishing a life outside the womb (the Supreme Court definition) and a "potential" ability to live outside the womb (the § 18-604 definition). A broader definition of viability which correspondingly narrows or restricts the woman's ability to obtain an abortion prior to viability conflicts with the Supreme Court's past ruling. OAG 98-1.

18-608A. Persons authorized to perform abortions. — It is unlawful for any person other than a physician to cause or perform an abortion. [I.C., § 18-608A, as added by 2000, ch. 7, § 3, p. 10.]

Compiler's notes. Sections 2 and 4 of S.L. 2000, ch. 7 are compiled as §§ 18-604 and 18-609, respectively.

18-609. Physicians and hospitals not to incur civil liability — Consent to abortion — Notice. — (1) Any physician may perform an abortion not prohibited by this act and any hospital or other facility described in section 18-608, Idaho Code, may provide facilities for such procedures without, in the absence of negligence, incurring civil liability therefor to any person including, but not limited to, the pregnant patient and the prospective father of the fetus to have been born in the absence of abortion, if informed consent for such abortion has been duly given by the pregnant patient.

(2) In order to provide assistance in assuring that the consent to an

abortion is truly informed consent, the director of the department of health and welfare shall publish, after consultation with interested parties, easily comprehended printed material to be made available at the expense of the physician, hospital or other facility providing the abortion, and which shall contain the following:

(a) Descriptions of the services available to assist a woman through a pregnancy, at childbirth and while the child is dependent, including adoption services, a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid available;

(b) Descriptions of the physical characteristics of a normal fetus, described at two (2) week intervals, beginning with the fourth week and ending with the twenty-fourth week of development, accompanied by scientifically verified photographs of a fetus during such stages of development. The description shall include information about physiological and anatomical characteristics, brain and heart function, and the presence of external members and internal organs during the applicable stages of development; and

(c) Descriptions of the abortion procedures used in current medical practices at the various stages of growth of the fetus and any reasonable foreseeable complications and risks to the mother, including those related to subsequent child bearing.

(3) No abortion shall be performed unless, prior to the abortion, the attending physician or the attending physician's agent (i) confirms or verifies a positive pregnancy test and informs the pregnant patient of a positive pregnancy test, and (ii) certifies in writing that the materials provided by the director of the department of health and welfare have been provided to the pregnant patient, if reasonably possible, at least twenty-four (24) hours before the performance of the abortion. If the materials are not available from the director of the department of health and welfare, no certification shall be required. The attending physician, or the attending physician's agent, shall provide any other information required under this act. In addition to providing the material, the attending physician may provide the pregnant patient with such other information which in the attending physician's judgment is relevant to the pregnant patient's decision as to whether to have the abortion or carry the pregnancy to term.

(4) If the attending physician reasonably determines that due to circumstances peculiar to a specific pregnant patient, disclosure of the material is likely to cause a severe and long lasting detrimental effect on the health of such pregnant patient, disclosure of the materials shall not be required. Within thirty (30) days after performing any abortion without certification and delivery of the materials, the attending physician, or the attending physician's agent, shall cause to be delivered to the director of the department of health and welfare, a report signed by the attending physician, preserving the patient's anonymity, which explains the specific circumstances that excused compliance with the duty to deliver the materials. The director of the department of health and welfare shall compile the informa-

tion annually and report to the public the total number of abortions performed in the state where delivery of the materials was excused; provided that any information so reported shall not identify any physician or patient in any manner which would reveal their identities.

(5) If section 18-608(3), Idaho Code, applies to the abortion to be performed and the pregnant patient is an adult and for any reason unable to give a valid consent thereto, the requirement for that pregnant patient's consent shall be met as required by law for other medical or surgical procedures and shall be determined in consideration of the desires, interests and welfare of the pregnant patient. [1973, ch. 197, § 8, p. 442; am. 1982, ch. 242, § 1, p. 627; am. 1983, ch. 149, § 1, p. 403; am. 2000, ch. 7, § 4, p. 10.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 197, compiled herein as §§ 18-604 — 18-608, 18-609, 18-610, and 18-612.

Collateral References. Validity, construction, and application of statutes requiring parental notification of or consent to minor's abortion. 77 A.L.R.5th 1.

Opinions of Attorney General. Idaho's informed consent provision contained in this section does not violate the United States Constitution. OAG 93-1.

The legislative intent and purpose behind this section was to provide legal protection from civil liability for physicians performing abortions in compliance with both § 18-608 and this section. Further, it was not the intent

and purpose of the legislature to impose criminal sanctions against a physician for non-compliance with this section. OAG 93-1.

While the former parental notification provision of this section (see now § 18-609A) contains no express bypass provision, judicial or otherwise, nor does it provide any other formal mechanism for exempting mature minors from its terms, but does require parental notification only "if possible," thus, seemingly, providing a safety valve in the notification requirement, such subsection would be vulnerable to attack unless a court were to find that the safety valve language — "if possible" — is flexible enough to provide an outlet for such a challenge. OAG 93-1.

18-609A. Consent required for abortions for minors. — (1)(a) No person shall knowingly cause or perform an abortion upon a minor unless:

- (i) The attending physician has secured the written informed consent of the minor and the written informed consent of the minor's parent; or
- (ii) The minor is emancipated and the attending physician has received written proof of emancipation and the minor's written informed consent; or
- (iii) The minor has been granted the right of self-consent to the abortion by court order pursuant to paragraph (b) of this subsection and the attending physician has received the minor's written informed consent; or
- (iv) A court has found that the causing or performing of the abortion, despite the absence of informed consent of a parent, is in the best interests of the minor and the court has issued an order, pursuant to paragraph (b)(iv)2. of this subsection, granting permission for the causing or performing of the abortion, and the minor is having the abortion willingly, pursuant to paragraph (f) of this subsection; or
- (v) A medical emergency exists for the minor so urgent that there is insufficient time for the physician to obtain the informed consent of a parent or a court order and the attending physician certifies such in the pregnant minor's medical records. In so certifying, the attending physician must include the factual circumstances supporting his professional judgment that a medical emergency existed and the grounds

for the determination that there was insufficient time to obtain the informed consent of a parent or a court order. Immediately after an abortion pursuant to this paragraph, the physician shall, with due diligence, attempt to provide a parent of an unemancipated minor actual notification of the medical emergency. If the parent cannot be immediately contacted for such actual notification, the physician shall, with due diligence, attempt to provide actual notification to a parent for an eight (8) hour period following the causing or performing of the abortion and shall, until a parent receives such notification, ensure that the minor's postabortion medical needs are met. Notwithstanding the above, a physician shall, within twenty-four (24) hours of causing or performing an abortion pursuant to this paragraph, provide actual notification of the medical emergency by:

1. Conferring with a parent or agent designated by the parent, and providing any additional information needed for the minor's proper care, and, as soon as practicable thereafter, securing the parent's written acknowledgement of receipt of such notification and information; or
2. Providing such actual notification in written form, addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent with written acknowledgement of such receipt by the parent returned to the physician; or
3. Providing such actual notification in written form and mailing it by certified mail, addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee so that a postal employee can only deliver the notice to the authorized addressee.

For the purposes of this section, "actual notification" includes, but is not limited to, a statement that an abortion was caused or performed, a description of the factual circumstances supporting the physician's judgment that the medical emergency existed and a statement of the grounds for the determination that there was insufficient time to obtain the informed consent of a parent or a court order.

If the physician causing or performing such abortion reasonably believes that the minor is homeless or abandoned so that the parents cannot be readily found or that the minor has suffered abuse or neglect such that the minor's physical safety would be jeopardized if a parent were notified that the abortion was caused or performed, the physician shall, in lieu of notifying a parent as required above, make a report to a law enforcement agency pursuant to section 16-1619, Idaho Code, and a petition shall be filed pursuant to section 16-1605, Idaho Code, which petition shall include a reference to this code section. Upon adjudication that the minor comes within the purview of chapter 16, title 16, Idaho Code, either on the basis of homelessness or abandonment such that no parent can be found, or on the basis of abuse or neglect such that the minor's physical safety would be in jeopardy if a parent were notified that the abortion was performed, the court shall, as a part of the decree,

also order that the physician's duty to so notify a parent is relieved. In any other event, unless the court enters a finding that the best interests of the child require withholding notice to a parent, the court shall order that a parent receive actual notification of the medical emergency and the causing or performing of the abortion.

(b) A proceeding for the right of a minor to self-consent to an abortion pursuant to paragraph (a)(iii) of this subsection or for a court order pursuant to paragraph (a)(iv) of this subsection, may be adjudicated by a court as follows:

(i) The petition shall be filed in the county where the minor resides or the county where the abortion is caused or performed. A minor shall have the legal capacity to make and prosecute a petition and appeal as set out herein. A guardian ad litem may assist the minor in preparing her petition and other documents filed pursuant to this section and may seek appointment as set forth below. A guardian ad litem, whether prospective or appointed, must be an attorney properly licensed in this state. The court shall ensure that the minor is given assistance in filing the petition if the minor so desires a guardian ad litem but no qualified guardian ad litem is available.

(ii) The petition shall set forth:

1. The initials of the minor;
2. The age of the minor;
3. The name and address of each parent, guardian, or, if the minor's parents are deceased or the minor is abandoned and no guardian has been appointed, the name and address of any other person standing in loco parentis of the minor;
4. That the minor has been fully informed of the risks and consequences of the abortion procedure to be performed;
5. A claim that the minor is mature, of sound mind and has sufficient intellectual capacity to consent to the abortion for herself;
6. A claim that, if the court does not grant the minor the right to self-consent to the abortion, the court should find that causing or performing the abortion, despite the absence of the consent of a parent, is in the best interest of the minor and give judicial consent to the abortion; and
7. If so desired by the minor, a request that the court appoint a guardian ad litem, or, alternatively, if no guardian ad litem is requested, that the court should consider whether appointment of a guardian ad litem for the minor is appropriate.

The petition shall be signed by the minor and, if she has received assistance from a prospective guardian ad litem in preparing the petition, by the guardian ad litem.

(iii) A hearing on the merits of the petition shall be held as soon as practicable but in no event later than five (5) days from the filing of the petition. The petition shall be heard by a district judge on the record in a closed session of the court. The court shall appoint a qualified guardian ad litem for the minor if one is requested in the petition. If no qualified guardian ad litem is available, the court may appoint some

other person to act in the capacity of a guardian ad litem, who shall act to fulfill the purposes of this section and protect the confidentiality and other rights of the minor.

At the hearing, the court shall, after establishing the identity of the minor, hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature of the abortion procedure to be performed and the reasonably foreseeable complications and risks to the minor from such procedure, including those related to future childbearing; the available alternatives to the abortion; the relationship between the minor and her parents; and any other evidence that the court may find relevant in determining whether the minor should be granted the right to self-consent to the abortion or whether the court's consent to causing or performing of the abortion, despite the absence of consent of a parent, is in the best interests of the minor.

(iv) The order shall be entered as soon as practicable, but in no event later than five (5) days after the conclusion of the hearing. If, by clear and convincing evidence, the court finds the allegations of the petition to be true and sufficient to establish good cause, the court shall:

1. Find the minor sufficiently mature to decide whether to have the abortion and grant the petition and give the minor the right of self-consent to the abortion, setting forth the grounds for so finding; or
2. Find the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding.

If the court does not find the allegations of the petition to be true or if good cause does not appear from the evidence heard, the court shall deny the petition, setting forth the grounds on which the petition is denied.

If, in hearing the petition, the court becomes aware of allegations which, if true, would constitute a violation of any section of title 18, Idaho Code, by a person other than the petitioner, or would bring a child within the purview of chapter 16, title 16, Idaho Code, the court shall order, upon entry of final judgment in the proceeding under this subsection, that an appropriate investigation be initiated or an appropriate information, complaint or petition be filed. Such allegations shall be forwarded by the court with due consideration for the confidentiality of the proceedings under this section. If, but for the requirements for proof as set forth in this section, the minor would have been privileged to withhold information given or evidence produced by her, the answers given or evidence produced and any information directly or indirectly derived from her answers may not be used against the minor in any manner in a criminal case, except that she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing or failing to produce, evidence as required by the court.

- (c) A notice of appeal from an order issued under the provisions of this subsection shall be filed within two (2) days from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected as soon as practicable, but in no event later than five (5) days from the filing of notice of appeal. Because time may be of the essence regarding the performance of the abortion, appeals pursuant to this subsection shall receive expedited appellate review.
- (d) Except for the time for filing a notice of appeal, a court may enlarge the times set forth pursuant to this subsection upon request of the minor or upon other good cause appearing, with due consideration for the expedited nature of these proceedings.
- (e) No filing, appeal or other fees shall be charged for cases or appeals brought pursuant to this section.
- (f) If a minor desires an abortion, then she shall be orally informed of, and, if possible, sign the written consent required by this act, in the same manner as an adult person. No abortion shall be caused or performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to court order if the abortion is necessary to preserve the life of the minor.
- (g) All records contained in court files of judicial proceedings arising under the provisions of this subsection, and subsection (3) of this section, shall be confidential and exempt from disclosure pursuant to section 9-340G, Idaho Code. Dockets and other court records shall be maintained and court proceedings undertaken so that the names of the parties to actions brought pursuant to this section will not be disclosed to the public.
- (2) The administrative director of the courts shall compile statistics for each county for each calendar year, accessible to the public, including:
- (a) The total number of petitions filed pursuant to paragraph (b) of subsection (1) of this section; and
 - (b) The number of such petitions filed where a guardian ad litem was requested and the number where a guardian ad litem or other person acting in such capacity was appointed; and
 - (c) The number of such petitions for which the right to self-consent was granted; and
 - (d) The number of such petitions for which the court granted its informed consent; and
 - (e) The number of such petitions which were denied; and
 - (f) For categories described in paragraphs (c), (d) and (e) of this subsection, the number of appeals taken from the court's order in each category; and
 - (g) For each of the categories set out in paragraph (f) of this subsection, the number of cases for which the district court's order was affirmed and the number of cases for which the district court's order was reversed.
- (3) In addition to any other cause of action arising from statute or otherwise, any person injured by the causing or performing of an abortion on a minor in violation of any of the requirements of paragraph (a) of subsection (1) of this section, shall have a private right of action to recover all damages sustained as a result of such violation, including reasonable attorney's fees if judgment is rendered in favor of the plaintiff.

(4) Statistical records.

(a) The vital statistics unit of the department of health and welfare shall, in addition to other information required pursuant to section 39-261, Idaho Code, require the complete and accurate reporting of information relevant to each abortion performed upon a minor which shall include, at a minimum, the following:

(i) Whether the abortion was performed following the physician's receipt of:

1. The written informed consent of a parent and the minor; or
2. The written informed consent of an emancipated minor for herself; or
3. The written informed consent of a minor for herself pursuant to a court order granting the minor the right to self-consent; or
4. The written informed consent of a court pursuant to an order which includes a finding that the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor; or
5. The professional judgment of the attending physician that the performance of the abortion was immediately necessary due to a medical emergency and there was insufficient time to obtain consent from a parent or a court order.

(ii) If the abortion was performed due to a medical emergency and without consent from a parent or court order, the diagnosis upon which the attending physician determined that the abortion was immediately necessary due to a medical emergency.

(b) The knowing failure of the attending physician to perform any one (1) or more of the acts required under this subsection is grounds for discipline pursuant to section 54-1814(6), Idaho Code, and shall subject the physician to assessment of a civil penalty of one hundred dollars (\$100) for each month or portion thereof that each such failure continues, payable to the center for vital statistics and health policy, but such failure shall not constitute a criminal act.

(5) As used in this section:

(a) "Cause or perform an abortion" means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage upon a minor known to be pregnant.

(b) "Emancipated" means any minor who has been married or is in active military service.

(c)(i) "Medical emergency" means a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:

1. To prevent her death; or
2. Because a delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.

(ii) The term “medical emergency” does not include:

1. Any physical condition that would be expected to occur in normal pregnancies of women of similar age, physical condition and gestation; or
2. Any condition that is predominantly psychological or psychiatric in nature.

(d) “Minor” means a woman less than eighteen (18) years of age.

(e) “Parent” means one (1) parent of the unemancipated minor, or a guardian appointed pursuant to chapter 5, title 15, Idaho Code, if the minor has one. [I.C., § 18-609A, as added by 2000, ch. 7, § 5, p. 10; am. 2001, ch. 277, § 2, p. 1000.]

Compiler’s notes. Sections 1 and 4 of S.L. 2001, ch. 277 are compiled as §§ 18-605 and 18-614, respectively. **Sec. to sec. ref.** This section is referred to in §§ 9-340G, 18-602 and 18-614.

18-610. Refusal to consent by pregnant woman — Effect. — Notwithstanding any provision of law permitting valid consent for medical or surgical procedures to be given by a person or persons other than the patient, the refusal of any pregnant woman, irrespective of age or competence, to submit to an abortion shall be grounds for a physician or hospital otherwise authorized to proceed, to decline performance of an abortion and/or to submit the matter of consent to adjudication by a court of competent jurisdiction. [1973, ch. 197, § 9, p. 442.]

18-611. Patient’s representations — Physicians and hospitals may accept. [Repealed.]

Compiler’s notes. Former § 18-611, which comprised 1973, ch. 197, § 10, p. 442, was repealed by S.L. 2000, ch. 7, § 6, effective July 1, 2000.

18-612. Refusal to perform abortions — Physicians and hospitals not liable. — Nothing in this act shall be deemed to require any hospital to furnish facilities or admit any patient for any abortion if, upon determination by its governing board, it elects not to do so. Neither shall any physician be required to perform or assist in any abortion, nor shall any nurse, technician or other employee of any physician or hospital be required by law or otherwise to assist or participate in the performance or provision of any abortion if he or she, for personal, moral or religious reasons, objects thereto. Any such person in the employ or under the control of a hospital shall be deemed to have sufficiently objected to participation in such procedures only if he or she has advised such hospital in writing that he or she generally or specifically objects to assisting or otherwise participating in such procedures. Such notice will suffice without specification of the reason therefor. No refusal to accept a patient for abortion or to perform, assist or participate in any such abortion as herein provided shall form the basis of any claim for damages or recriminatory action against the declining person, agency or institution. [1973, ch. 197, § 11, p. 442.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 197 compiled as §§ 18-604 — 18-608, 18-609, 18-610, and 18-612.

18-613. Partial-birth abortions prohibited. — (1) Prohibited acts. Any physician who knowingly performs a partial-birth abortion and thereby kills a human fetus shall be subject to the penalties imposed in section 18-605, Idaho Code. This section shall not apply to partial-birth abortions necessary to save the life of the mother when her life is endangered by a physical disorder, illness or injury.

(2) Definitions. As used in this section:

(a) "Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(b) The phrase "vaginally delivers a living fetus before killing the fetus" means deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion of the fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and which kills the fetus.

(c) "Physician" has the same meaning provided in section 18-604, Idaho Code. However, any individual who is not a physician or not otherwise legally authorized by this state to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the prohibitions described in this section.

(3)(a) Civil actions. The father of the aborted fetus, if married to the mother of the aborted fetus at the time of the abortion; or the maternal grandparents of the aborted fetus, if the mother is not at least eighteen (18) years of age at the time of the abortion, may bring a civil action against the defendant physician to obtain appropriate relief. Provided however, that a civil action by the plaintiff father is barred if the pregnancy resulted from criminal conduct by the plaintiff father or he consented to the abortion. Further, a civil action by the plaintiff maternal grandparents is barred if the pregnancy is the result of criminal conduct by a maternal grandparent or a maternal grandparent consented to the abortion.

(b) As used in this section, "appropriate relief" shall include:

(i) Money damages for all mental and physical injuries suffered by the plaintiff as a result of the abortion performed in violation of this section;

(ii) Money damages equal to three (3) times the cost of performing the abortion procedure.

(4)(a) Hearing. A physician accused of violating this section may request a hearing before the state board of medicine to determine whether the mother's life was endangered by a physical disorder, illness or injury and therefor whether performing the abortion was necessary to save the mother's life.

(b) The findings of the board of medicine regarding the issues described in subsection (4)(a) of this section are admissible at the criminal and civil trials of the defendant physician. Upon a motion by the defendant physician, the court shall delay the beginning of the criminal and civil

trials for not more than thirty (30) days to permit the hearing to take place.

(5) Immunity. A woman upon whom a partial-birth abortion is performed shall not be prosecuted for violations of this section, for conspiracy to violate this section, or for violations of section 18-603, 18-605 or 18-606, Idaho Code, in regard to the partial-birth abortion performed. [I.C., § 18-613, as added by 1998, ch. 34, § 1, p. 153.]

Compiler's notes. Former § 18-613, which comprised 1973, ch. 197, § 14, p. 442, was repealed by S.L. 1990, ch. 207, § 1.

Section 2 of S.L. 1998, ch. 34 declared an emergency and provided that this act shall be

in full force and effect on and after its passage and approval. Approved March 16, 1998.

Collateral References. Validity, construction, and application of statutory restrictions on partial birth abortions. 76 A.L.R.5th 637.

18-614. Defenses to prosecution. — (1) No physician shall be subject to criminal or administrative liability for causing or performing an abortion upon a minor in violation of any provision of subsection (1) of section 18-609A, Idaho Code, if prior to causing or performing the abortion the physician obtains either positive identification or other documentary evidence from which a reasonable person would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a minor and if the physician retained, at the time of receiving the evidence, a legible photocopy of such evidence in the physician's office file for the woman. This defense is an affirmative defense that shall be raised by the defendant and is not an element of any crime or administrative violation that must be proved by the state.

(2) If, due to a medical emergency as defined in subsection (5) of section 18-609A, Idaho Code, there was insufficient time for the physician to confirm that the woman, due to her age, did not then come within the provisions of subsection (1) of section 18-609A, Idaho Code, the physician shall not be subject to criminal or administrative liability for performing the abortion in violation of subsection (1)(a)(v) of section 18-609A, Idaho Code, if, as soon as possible but in no event longer than twenty-four (24) hours after performing the abortion, the physician obtained positive identification or other documentary evidence from which a reasonable person would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a minor and if the physician retained, at the time of receiving the evidence, a legible photocopy of such evidence in the physician's office file for the woman. This defense is an affirmative defense that shall be raised by the defendant and is not an element of any crime or administrative violation that must be proved by the state.

(3) If after performing an abortion under circumstances of a medical emergency as defined in subsection (5) of section 18-609A, Idaho Code, the physician, after reasonable inquiry, is unable to determine whether or not the woman is a minor, the physician shall not be subject to criminal, civil or administrative liability for taking any action that would have been required by subsection (1)(a)(v) of section 18-609A, Idaho Code, if the woman had been a minor at the time the abortion was caused or performed.

(4) For purposes of this section, "positive identification" means a lawfully issued state, district, territorial, possession, provincial, national or other

equivalent government driver's license, identification card or military card, bearing the person's photograph and date of birth, the person's valid passport or a certified copy of the person's birth certificate. [I.C., § 18-614, as added by 2001, ch. 277 § 4, p. 1000.]

Compiler's notes. Former section 18-614, which comprised I.C., § 18-614, as added by 2000, ch. 7, § 7, p. 10, was repealed by S.L. 2001, ch. 277, § 3.

Section 2 of S.L. 2001, ch. 277 is compiled as § 18-609A.

18-615. Severability. — If any one (1) or more provision, section, subsection, sentence, clause, phrase, or word of this chapter or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this chapter shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed every section of this chapter and each provision, section, subsection, sentence, clause, phrase or word thereof irrespective of the fact that any one (1) or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional. [I.C., § 18-615, as added by 2000, ch. 7, § 8, p. 10.]

Compiler's notes. Former § 18-615, which comprised 1973, ch. 197, § 16, p. 442, was repealed by S.L. 1990, ch. 207, § 1.

Section 9 of S.L. 2000, ch. 7 is compiled as § 9-340G.

CHAPTER 7

ARRESTS AND SEIZURES OF PERSONS OR PROPERTY—SPECIAL OFFICERS

SECTION.

- 18-701. Refusal of officer to make arrest.
- 18-702. [Repealed.]
- 18-703. Illegal arrests and seizures.
- 18-704. Inhuman treatment of prisoners.
- 18-705. Resisting and obstructing officers.
- 18-706. Unnecessary assaults by officers.
- 18-707. Refusing assistance to officers.
- 18-708. Recapture of goods from legal custody.

SECTION.

- 18-709. Maliciously procuring warrant.
- 18-710. [Repealed.]
- 18-711. Unlawful exercise of functions of peace officers — Unlawful importation of police officers — Suppression of violence — Exceptions.
- 18-712. Civil liability for importing police officers or armed men.

18-701. Refusal of officer to make arrest. — Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who wilfully refuses to receive or arrest any person charged with criminal offense, is punishable by fine not exceeding \$5,000, and imprisonment in the county jail not exceeding one (1) year. [I.C., § 18-701, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 108; R.S., R.C., & C.L., § 6510; C.S., § 8178; I.C.A., § 17-1001, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-701, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Opinions of Attorney General. Counties are responsible for the cost incurred by the

county jail in housing a prisoner who has been charged with a state law violation committed within city limits and investigated by city police officers, and while counties may bring

legal action to recoup jail costs incurred for city prisoners charged under city ordinances or state motor vehicle laws, sheriffs cannot refuse to accept city prisoners. OAG 84-4.

18-702. Delay in taking person arrested before magistrate. [Repealed.]

Compiler's notes. Former § 18-702, which comprised I.C., § 18-702, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 131, § 7, effective July 1, 1994.

Another former § 18-702, which comprised R.S., R.C., & C.L., § 6512; C.S., § 8180; I.C.A., § 17-1003, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

substituted therefor was a section comprising I.C., § 18-702, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

18-703. Illegal arrests and seizures. — Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor. [I.C., § 18-703, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6513; C.S., § 8181; I.C.A., § 17-1004, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-703, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. False personation, § 18-3001.

18-704. Inhuman treatment of prisoners. — Every officer who is guilty of wilful inhumanity or oppression toward any prisoner under his care or in his custody is punishable by fine not exceeding \$5,000, and removal from office. [I.C., § 18-704, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 96; R.S., R.C., & C.L., § 6514; C.S., § 8182; I.C.A., § 17-1005, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-704, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972,

Issuance of warrant of arrest, §§ 19-506 — 19-509.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Searches without warrant under fish and game law, § 36-1303.

When peace officer may arrest, § 19-603.

Cited in: State v. Richardson, 95 Idaho 446, 511 P.2d 263 (1973).

Collateral References. 5 Am. Jur. 2d, Arrest, §§ 37, 90, 115, 116, 150, 151.

6A C.J.S., Arrest, § 111.

ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Collateral References. 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 181-209.

72 C.J.S., Prisons, § 125.

18-705. Resisting and obstructing officers. — Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false

report to any peace officer, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars (\$1,000), and imprisonment in the county jail not exceeding one (1) year. [I.C., § 18-705, as added by 1972, ch. 336, § 1, p. 844; am. 1982, ch. 50, § 1, p. 75.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 100; R.S., R.C., & C.L., § 6515; C.S., § 8183; I.C.A., § 17-1006, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Rule to sec. ref. This section is referred to in M.C.R., Rule 13.

Cited in: *Martin v. Lyons*, 98 Idaho 102, 558 P.2d 1063 (1977); *Frank v. City of Caldwell*, 99 Idaho 498, 584 P.2d 643 (1978); *State v. McNary*, 100 Idaho 244, 596 P.2d 417 (1979); *Hopper v. Hayes*, 573 F. Supp. 1368 (D. Idaho 1983); *State v. Rutter*, 112 Idaho 1142, 739 P.2d 441 (Ct. App. 1987); *State v. Wilkerson*, 121 Idaho 345, 824 P.2d 920 (Ct. App. 1992); *State v. Pick*, 124 Idaho 601, 861 P.2d 1266 (Ct. App. 1993); *State v. Bowman*, 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993); *State v. Brandt*, 135 Idaho 205, 16 P.3d 302 (Ct. App. 2000); *Mallonee v. Dep't of Corr.*, — Idaho —, 84 P.3d 551 (2004).

ANALYSIS

Defenses.

Duty to public.

Exigent circumstances.

Instructions.

Intent.

Notice.

Order or act of officer contrary to law.

Other punishment.

Permissible seizure.

Private right of action.

Probable cause for arrest.

Prosecutorial misconduct.

Question for jury.

Request of officer lawful and authorized.

Right to counsel.

Separate and distinct acts.

Sufficiency of evidence.

Sufficiency of uniform citation.

Vagueness challenge.

Defenses.

It is no defense for defendant to show that threats had been made against him by other parties, or that he was in fear as to his person or property. *State v. Winter*, 24 Idaho 749, 135 P. 739 (1913).

Duty to public.

The officers had a duty to the general public in addition to the duty owed to the suspect. The officers' duty to the general public when arresting a potentially dangerous individual is to protect innocent bystanders from any

harm the arrestee may inflict upon them during the process of being arrested. *Kessler v. Barowsky*, 129 Idaho 640, 931 P.2d 634 (Ct. App. 1996).

Exigent Circumstances.

The situation was one of exigent circumstances that justified a forced entry, and the attempt to enter the house was not properly resisted; however, a prompt and limited search of the scene should be strictly circumscribed by the exigency and cannot be used to support a general exploratory search. *State v. Wiedenheft*, 136 Idaho 14, 27 P.3d 873 (Ct. App. 2001).

Instructions.

Where, in a prosecution for obstructing a police officer and committing a battery upon a police officer, there was a question of fact whether the defendant had made a lunge at one officer, justifying the other in grabbing the defendant from behind, and there also was a related question as to whether the officers at any time used force to an excessive degree, the magistrate's refusal to instruct the jury on the right of a citizen to resist excessive force by police constituted reversible error entitling the defendant to a new trial. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

Intent.

No special intent is necessary, but defendant must have had knowledge that person resisted was an officer, engaged in discharge or attempted discharge of his duty. *State v. Winter*, 24 Idaho 749, 135 P. 739 (1913).

An attorney's unsworn oral misstatement to police officers regarding the whereabouts of a safe belonging to the attorney's client, whom the police were investigating, did not constitute obstructing and delaying an officer within the meaning of this section. *State v. Brandstetter*, 127 Idaho 885, 908 P.2d 578 (Ct. App. 1995).

Notice.

Where deputy sheriff was faced with a dangerous drunk who was attempting to strike him with a potentially lethal weapon, the deputy was not required to give the statutory notice that he was placing defendant under arrest until defendant physically had been subdued. *State v. Dolsby*, 124 Idaho 271, 858 P.2d 810 (Ct. App. 1993).

Order or Act of Officer Contrary to Law.

Where an individual refuses to obey an order or obstructs an act of a public officer

which is contrary to the law, be it statute or constitution, that individual does not violate this section. *State v. Wilkerson*, 114 Idaho 174, 755 P.2d 471 (Ct. App.), *aff'd*, 115 Idaho 357, 766 P.2d 1238 (1988).

Other Punishment.

Where a defendant threatened to kill a police officer who arrested him, such conduct constituted an attempt to prevent by threat an executive officer from performing his duty punishable under § 18-2703 (repealed); thus, such action was not punishable under a former version of this section. *State v. Wozniak*, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

Permissible Seizure.

While not ruling as to whether activation of the patrol car's emergency lights was a show of authority that effectuated a seizure, but instead assuming that activation of the lights effectuated a seizure by conveying to defendant that she was not free to leave, such a seizure was reasonable and constitutionally permissible in view of the surrounding circumstances. *State v. Waldie*, 126 Idaho 864, 893 P.2d 811 (Ct. App. 1995).

Private Right of Action.

A private right of action for insurance company's alleged obstruction of justice and violations of the Idaho Bribery and Corrupt Influences Act (chapter 13, title 18, Idaho Code) was not available and district court's dismissal of these claims was proper. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

Probable Cause for Arrest.

Probable cause existed to arrest defendant for obstructing and delaying an officer in the discharge of his duties where, as a passenger in a car driven by his wife, defendant was aware that the police were attempting to cite his wife for various traffic violations, yet, when ordered to keep his hands in plain view, away from the bulge in his jacket, he refused to do so, and where defendant pushed an officer who was using reasonable force to place his hands on the hood of the car in an attempt to pat defendant down. *State v. Wight*, 117 Idaho 604, 790 P.2d 385 (Ct. App. 1990).

Reasonable or probable cause for an arrest exists where the officers possess information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992).

Though defendant did not touch the officers, he placed himself in the path of the officers, forcing them to push him out of the

way. Defendant ignored the officers' repeated verbal requests to move away. He placed himself unnecessarily close to the officers and made hand gestures in front of their faces. These facts were sufficient to establish probable cause for defendant's arrest. *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992).

Where there were other sufficient facts to establish probable cause for arrest, the fact that defendant turned around and ran gave the officers an additional basis under which they had probable cause to arrest him. *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992).

Prosecutorial Misconduct.

While defendant did not object to the prosecutor's comments during trial, review of the error was warranted under the doctrine of fundamental error; contrary to defendant's argument, the prosecutor did not advise the jury that it was entitled to consider evidence of defendant's refusal to be fingerprinted or photographed in determining whether defendant violated § 18-705, and thus there was no prosecutorial misconduct. *State v. Adams*, 138 Idaho 624, 67 P.3d 103 (Ct. App. 2003).

Question for Jury.

In prosecution for resisting and obstructing a police officer, whether the officer was performing a duty of his office when he called tow truck operator and ordered the defendant to cease her obstruction of the tow turned upon a resolution by the jury of those factual matters. *State v. Wilkerson*, 114 Idaho 174, 755 P.2d 471 (Ct. App.), *aff'd*, 115 Idaho 357, 766 P.2d 1238 (1988).

Request of Officer Lawful and Authorized.

Where defendant was exceeding the speed limit, the stop was valid and did not constitute an unreasonable search and the officer's request for defendant's license, registration and proof of insurance was a lawful and authorized act, and her refusal to produce those documents constituted obstructing and delaying an officer in the performance of a duty of his office. *State v. George*, 127 Idaho 693, 905 P.2d 626 (1995).

Right to Counsel.

The magistrate court erred by denying defendant's right to counsel when it did not appoint counsel to help with his defense to the charge of delaying and obstructing a peace officer. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

Separate and Distinct Acts.

Where, in prosecution for obstructing a police officer and battery upon a police officer, the alleged act of battery — the kick making contact with an officer — could be viewed

either as a fortuitous event subsumed by the general struggle or as an event separated in time and place from the rest of the altercation, the magistrate was directed on remand to instruct the jury that they could not convict of both offenses unless they were convinced beyond a reasonable doubt that both alleged crimes arose out of separate and distinct acts, each accompanied by criminal intent. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

Sufficiency of Evidence.

Defendant testified that he was in a manic state at the time he was arrested and that his arms "went out" when officer handcuffed him and officer testified that he had to wrestle with defendant in order to restrain him; therefore, based on this testimony, there was sufficient evidence to support the resisting an officer conviction. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

Evidence was sufficient to sustain the defendant's conviction for obstructing an officer where the defendant struck the officer after the officer told the defendant he was under arrest. *State v. Hollon*, 136 Idaho 499, 36 P.3d 1287 (Ct. App. 2001).

There was sufficient evidence to support defendant's conviction of resisting, delaying, or obstructing a public officer; defendant fled from police when they tried to talk to him and hid in a bedroom closet in an attempt to avoid them. *State v. Anderson*, 138 Idaho 359, 63 P.3d 485 (Ct. App. 2003).

Given that defendant refused to cooperate with police when arrested, and given that defendant repeatedly used profanity in addressing officers once defendant arrived at the county jail, there was sufficient evidence to support defendant's conviction of resisting and obstructing an officer. *State v. Adams*, 138 Idaho 624, 67 P.3d 103 (Ct. App. 2003).

Sufficiency of Uniform Citation.

Where defendant was charged pursuant to this section, the officer's inscription of the

date, time, the words "resisting, obstructing and delaying an officer" and the number of the applicable code section on the preprinted Uniform Citation Form was sufficient to charge an offense, and defendant could have utilized Misdemeanor Criminal Rule 3(d) to demand a sworn complaint had he been in doubt as to the nature of the offense charged. *State v. Cahoon*, 116 Idaho 399, 775 P.2d 1241 (1989).

Vagueness Challenge.

Where the plaintiff is found to have engaged in conduct which is clearly proscribed by this section, plaintiff cannot complain of the vagueness of the law as applied to the conduct of others. *Hallstrom v. City of Garden City*, 811 F. Supp. 1443 (D. Idaho 1991), modified on other grounds, 991 F.2d 1473 (9th Cir. Idaho 1993).

Absent a finding that this section implicates a substantial amount of constitutionally protected conduct, striking down this section based on a facial vagueness review would be improper. *Hallstrom v. City of Garden City*, 811 F. Supp. 1443 (D. Idaho 1991), modified on other grounds, 991 F.2d 1473 (9th Cir. Idaho 1993).

This section and § 18-114 give fair warning to a person of common intelligence that defendant's conduct in swinging a crutch at a police officer was forbidden and subject to the penalty of law; therefore, this section, as applied, was not constitutionally defective as void-for-vagueness. *State v. Dolsby*, 124 Idaho 271, 858 P.2d 810 (Ct. App. 1993).

Collateral References. 5 Am. Jur. 2d, Arrest, §§ 4, 105-116.

58 Am. Jur. 2d, Obstructing Justice, §§ 54-71.

67 C.J.S., Obstructing Justice, §§ 1—12.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

18-706. Unnecessary assaults by officers. — Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding \$5,000 and imprisonment in the county jail not exceeding one (1) year. [I.C., § 18-706, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6516; C.S., § 8184; I.C.A., § 17-1007, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-707. Refusing assistance to officers. — Every male person above eighteen (18) years of age who neglects or refuses to join the posse comitatus

or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or in commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge or other officer concerned in the administration of justice, is punishable by fine of not less than fifty dollars (\$50.00) nor more than \$1,000. [I.C., § 18-707, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 36; R.S., R.C., & C.L., § 6517; C.S., § 8185; I.C.A., § 17-1008; am. 1969, ch. 127, § 1, p. 393, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *Smith v. Lowe*, 121 F. 753 (9th Cir. 1903).

18-708. Recapture of goods from legal custody. — Every person who wilfully injures or destroys, or takes, or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor. [I.C., § 18-708, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6447; C.S., § 8147; I.C.A., § 17-802, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-709. Maliciously procuring warrant. — Every person who, maliciously and without probable cause, procures a search warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor. [I.C., § 18-709, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6533; C.S., § 8201; I.C.A., § 17-1024, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-710. Restrictions on appointment of police officers. [Repealed.]

Compiler's notes. A former section, which comprised 1890-1891, p. 15, § 1; reen. 1899, p. 9, § 1; reen. R.C. & C.L., § 6545; C.S., § 8206; I.C.A., § 17-1029, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and substituted therefor was a section

comprising I.C., § 18-710 as added by S.L. 1972, ch. 336, § 1 dealing with the same subject which section was in turn repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-711. Unlawful exercise of functions of peace officers — Unlawful importation of police officers — Suppression of violence — Exceptions. — 1. Any person who shall in this state unlawfully exercise or attempt to exercise the functions of, or hold himself out to any one as, a

deputy sheriff, marshal, policeman, constable or peace officer, or any person, whether acting in his own behalf or as an officer of the law, or as the authorized or unauthorized agent or representative of another, or of any association, corporation or company, who shall bring or cause to be brought, or aid in bringing into this state any armed or unarmed police force or detective agency or force, or any armed or unarmed body of men for the suppression of domestic violence, shall be guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state prison for not less than two (2) years and not more than five (5) years: provided, that the legislature, or the executive when the legislature can not be convened, may call upon the lawfully constituted authorities of the United States for the protection against invasion and domestic violence, as provided in section 4 of article 4 of the Constitution of the United States.

2. This section shall not apply to a law enforcement officer who pursuant to an interlocal cooperation plan upon receiving an emergency request from an Idaho law enforcement officer enters Idaho to give assistance; nor shall this section apply to the Idaho law enforcement officer who makes a request for emergency assistance. [I.C., § 18-711, as added by S.L. 1972, ch. 336, § 1, p. 844; am. 1975, ch. 130, § 1, p. 287.]

Compiler's notes. A former section, which comprised 1890-1891, p. 15, § 2; reen. 1899, p. 9, § 2; reen. R.C. & C.L., § 6546; C.S., § 8207; I.C.A., § 17-1030, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 2 of S.L. 1975, ch. 130 declared an emergency. Approved March 26, 1975.

Cross ref. No armed police force or detective agency, or armed body of men shall be brought into the state for the suppression of domestic violence, except on the application of the legislature, or of the executive when the legislature cannot be convened. Const. art. 14, § 6.

ANALYSIS

Construction.

Mayor authorizing employment.

Construction.

The construction of the statute provides two manners in which the statute can be violated; a person can violate the statute by

exercising or attempting to exercise the functions of or holding himself or herself out to anyone as one of the delineated law officials, or the statute can be violated when a person, acting on his or her own behalf, or as an officer, or as an agent for another or a company, brings or aids in bringing an armed or unarmed police force or body of men into the state. *State v. Rivera*, 131 Idaho 8, 951 P.2d 528 (Ct. App. 1998).

Mayor Authorizing Employment.

Where the mayor of a city authorizes a person to select detectives or policemen to act for and on behalf of the city, and such persons, residents of Washington state, are so selected and serve in such capacity and are paid by such person, who thereafter presents a claim against the city for the money so expended, and the city council allows such claim and orders and directs that a warrant issue in payment therefor, the acts of the council are a ratification of the mayor's acts in authorizing the selection of such person to act for and on behalf of the city, and the expense thereby incurred becomes a city charge, which the city is authorized to pay. *Moore v. Hupp*, 17 Idaho 232, 105 P. 209 (1909).

18-712. Civil liability for importing police officers or armed men.

— Any person, officer, company, association or corporation who shall knowingly bring, or cause to be brought, or aid in bringing, into this state any armed or unarmed police force, detective agency or force, or armed or unarmed body of men for the suppression of domestic violence, shall be liable in a civil action to any person for any injury to person or property through the action, or as the result of the coming or bringing into the state

of such body of men, or any of them, whether acting together or separately in carrying out the purpose for which they were brought or came into the state. [I.C., § 18-712, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised 1890-1891, p. 15, § 3; reen. 1899, p. 9, § 3; reen. R.C. & C.L., § 6547; C.S., § 8208; I.C.A., § 17-1031, was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

CHAPTER 8

ARSON

SECTION.	SECTION.
18-801. Arson — Definitions.	18-804. Arson in the third degree — Burning of real or personal property or forest land — Penalties.
18-802. Arson in first degree — Burning of dwelling or other structures where persons are normally present — Penalties.	18-805. Aggravated arson — Penalties.
18-803. Arson in the second degree — Burning of a structure — Penalties.	18-806. [Repealed.]

18-801. Arson — Definitions. — In this chapter, the following terms have the following meanings:

- (1) “Damage”, in addition to its ordinary meaning, includes any charring, scorching, burning or breaking, and shall include any diminution in the value of any property as a consequence of an act;
- (2) “Dwelling” means any structure used or intended for use as human habitation;
- (3) “Structure” means any building of any kind, including fixtures and appurtenances attached thereto, any coliseum, bridge or carport, any tent or other portable building, or any vehicle, vessel, watercraft or aircraft;
- (4) “Real property” means any land, and shall include any crops growing thereon;
- (5) “Personal property” means any tangible property, including anything severed from the land;
- (6) “Forest land” means any brush covered land, cut-over land, forest, prairie, grasslands, wetlands or woods;
- (7) “Firefighter” means any person assisting in the suppression or extinguishment of any fire or explosion. [I.C., § 18-801, as added by 1993, ch. 107, § 2, p. 273.]

Legislative Intent. Section 1 of S.L. 1993, ch. 107 read: “It is the finding of the Legislature that the crime of arson presents a serious threat to human life and creates an extraordinary financial cost as a result of the destruction of property. This arson code categorizes the severity of penalty and punishment based upon the priority of human life as our greatest concern, thereafter followed by concern for costs resulting from the loss of property. The addition of a definition section will clarify the categories of property protected under these laws and allow for the charging of arson not

only in cases involving a charring or burning, but also, in any circumstances in which there has been any damage to property as a result of fire or explosion.

Compiler’s notes. Former § 18-801, which comprised (I.C., § 18-801, as added by 1972, ch. 336, § 1, p. 844), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

A second former section, which comprised I.C.A., § 17-3310, as added by 1939, ch. 67, § 2, p. 118, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A third former section which comprised

I.C., § 18-801, as added by 1971, ch. 143, § 1, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Cross ref. Electrical transmission plants and lines, burning or destruction of a felony, §§ 18-6803 — 18-6805.

Mines, burning underground workings of, a felony, §§ 18-7024, 18-7025.

Timber and prairies, violation of law for

protection against fire, a misdemeanor, § 18-7004.

Forest fires, precautions against and regulations regarding, § 38-107 et seq.

Idaho Arson and Fraud Reporting-Immunity Act, §§ 41-290 — 41-298.

Uniform fire code, § 41-253 et seq.

Sec. to sec. ref. This section is referred to in § 18-7803.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Burning of jail.

Persistent violator.

Sentence.

Sufficiency of evidence.

Burning of Jail.

Any building which is usually occupied by any person lodging therein at night is an inhabited building within the law of arson; consequently a jail is a subject of arson. *State v. Collins*, 3 Idaho 467, 31 P. 1048 (1892).

Persistent Violator.

A sentence of 21 years was not excessive for one convicted of arson in the first degree who was found to be a persistent violator under § 19-2514. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

Sentence.

An indeterminate sentence of not to exceed 20 years was not excessive for first-degree arson, in view of the defendant's relatively extensive prior criminal record, and the risk of injury or death to the public in general, and firefighters in particular, caused by the defendant's actions. *State v. Knight*, 106 Idaho 496, 681 P.2d 6 (Ct. App. 1984).

A sentence of ten years with a three-year minimum period of confinement was not excessive for a defendant who plead guilty to first-degree arson. *State v. Harper*, 116 Idaho 335, 775 P.2d 649 (Ct. App. 1989).

Sufficiency of Evidence.

Evidence held sufficient to allow the jury to find beyond a reasonable doubt that fire in defendant's mobile home was likely to have been the result of arson and that defendant was the perpetrator. *State v. Jussaume*, 112 Idaho 108, 730 P.2d 1028 (Ct. App. 1986).

An accomplice's testimony linking defendant to a fire which destroyed his own house was sufficiently corroborated by evidence that defendant moved almost all of his uninsured equipment out of the house just before the fire, that defendant called the fire department from neighbor's house instead of his own, that defendant made an appointment prior to the fire to get a new artificial leg, that defendant left his wallet and checkbook in pickup taken by his accomplice, that defendant listed an inflated value for his house on his proof of loss form, that defendant had access to the two points of origin of the fire which expert testified were started by accelerants, that he had opportunity to set the fire in those areas and that defendant would gain substantially if his inflated proof of loss was paid. *State v. Morris*, 116 Idaho 16, 773 P.2d 284 (Ct. App. 1989).

Collateral References. 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq.

6A C.J.S., Arson, §§ 4—22.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1322.

"Outhouse" or "outbuilding," what is. 20 A.L.R. 234.

Evidence of other offenses in prosecution for. 63 A.L.R. 605.

Entrapment to commit crime. 66 A.L.R. 483; 86 A.L.R. 263.

Vacancy or nonoccupancy of building as affecting its character as "dwelling." 44 A.L.R.2d 1456.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires. 87 A.L.R.2d 891.

What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

18-802. Arson in first degree — Burning of dwelling or other structures where persons are normally present — Penalties. — Any person who willfully and unlawfully, by fire or explosion, damages:

(1) Any dwelling, whether occupied or not; or

(2) Any structure, whether occupied or not, in which persons are normally present, including without limitation: jails, prisons or detention

centers; hospitals, nursing homes or other health care facilities; department stores, office buildings, business establishments, churches or educational institutions, or other similar structures; or

(3) Any other structure which the actor has reasonable grounds to believe is occupied by a human being; or

(4) Any real or personal property, whether the property of the actor or another, with the intent to deceive or harm any insurer or any person with a legal or financial interest in the property, or obtain any financial gain for the actor or another;

is guilty of arson in the first degree, and upon conviction thereof shall be sentenced to the custody of the department of correction for not more than twenty-five (25) years or fined not more than one hundred thousand dollars (\$100,000) or both. [I.C., § 18-802, as added by 1993, ch. 107, § 3, p. 273.]

Compiler’s notes. Former § 18-802, which comprised (I.C., § 18-802, as added by 1972, ch. 336, § 1, p. 844), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

Another former section, which comprised I.C.A., § 17-3311, as added by 1939, ch. 67, § 2, p. 118, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A third former section which comprised I.C., § 18-802, as added by 1971, ch. 143, § 1 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Cross ref. Electrical transmission plants and lines, burning or destruction of a felony, §§ 18-6803 — 18-6805.

Mines, burning underground workings of, a felony, §§ 18-7024, 18-7025.

Timber and prairies, violation of law for protection against fire, a misdemeanor, § 18-7004.

Forest fires, precautions against and regulations regarding, § 38-107 et seq.

Idaho Arson and Fraud Reporting-Immunity Act, §§ 41-290 — 41-298.

Uniform fire code, § 41-253 et seq.

Sec. to sec. ref. This section is referred to in §§ 18-805, 18-7803.

Cited in: *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002).

ANALYSIS

- Constitutionality.
- Double jeopardy.
- Inconsistent verdicts.
- Sentence not excessive.

DECISIONS UNDER PRIOR LAW

ANALYSIS

- Corpus delicti.
- Impeachment of conviction.
- Instructions.
- Sentence.

Constitutionality.

This section is not unconstitutionally vague because it gives adequate notice to people of ordinary intelligence concerning the conduct it proscribes, and it is not overbroad because arson is within the reach of the state’s police power. *State v. Leferink*, 133 Idaho 780, 992 P.2d 775 (1999).

Double Jeopardy.

One of defendant’s convictions for aggravated first degree arson was vacated because, although defendant’s act of arson was enhanced to aggravated arson by virtue of the deaths of two persons, defendant could not be convicted for two acts of arson when there was only one fire. *State v. Payne*, 134 Idaho 423, 3 P.3d 1251 (2000).

Inconsistent Verdicts.

The jury’s verdict was not impermissibly inconsistent where the jury acquitted defendant of first degree arson but convicted him of aggravated first degree arson. *State v. Payne*, 134 Idaho 423, 3 P.3d 1251 (2000).

Sentence Not Excessive.

Where defendant was found guilty of two counts of first degree arson for setting fire to a vacant house and to an occupied home, the district court did not abuse its discretion by sentencing him to seven years’ fixed incarceration. *State v. Brizendine*, 123 Idaho 886, 853 P.2d 631 (Ct. App. 1993).

Corpus Delicti.

The corpus delicti in a prosecution for arson in the second degree was established by circumstantial evidence that included testimony of a witness who observed defendant fleeing and carrying a can which was later found to

contain gasoline and opinion testimony of the fire chief who examined the premises after the fire. *State v. Johnson*, 96 Idaho 727, 536 P.2d 295 (1975).

Impeachment of Conviction.

Where a defendant was convicted of arson under this section, a subsequent judgment in his favor in a civil action brought by the owner of the burned building could not be used to impeach the arson conviction. *State v. Johnson*, 96 Idaho 727, 536 P.2d 295 (1975).

Instructions.

Trial court properly refused to give an instruction in an arson case that all fires are presumed to be caused by accidental or natural causes where there were no facts presented raising any issue as to the incendiary origin of the fire. *State v. Johnson*, 96 Idaho 727, 536 P.2d 295 (1975).

Sentence.

A judge did not abuse his discretion in imposing a 15-year sentence with a minimum of six years confinement, or in later refusing to reduce the sentence for a defendant convicted of bombing a public structure under

former law, where the judge explained the sentence in terms of protecting society, retribution and deterrence and also took rehabilitation into account. *State v. Langley*, 115 Idaho 727, 769 P.2d 604 (Ct. App. 1989).

Collateral References. 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq.

6A C.J.S., Arson, §§ 4—22.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1322.

"Outhouse" or "outbuilding," what is. 20 A.L.R. 234.

Evidence of other offenses in prosecution for. 63 A.L.R. 605.

Entrapment to commit crime. 66 A.L.R. 483; 86 A.L.R. 263.

Vacancy or nonoccupancy of building as affecting its character as "dwelling." 44 A.L.R.2d 1456.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires. 87 A.L.R.2d 891.

What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

18-803. Arson in the second degree — Burning of a structure — Penalties. — Any person who willfully and unlawfully, by fire or explosion, damages any structure, whether the property of the actor or another, not included or described in the preceding section, is guilty of arson in the second degree, and upon conviction thereof shall be sentenced to the custody of the department of correction for not more than fifteen (15) years or fined not more than seventy-five thousand dollars (\$75,000) or both. [I.C., § 18-803, as added by 1993, ch. 107, § 4, p. 273.]

Compiler's notes. Former § 18-803, which comprised (I.C., § 18-803, as added by 1972, ch. 336, § 1, p. 844), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

A second former section, which comprised I.C.A., § 17-3312, as added by 1939, ch. 67, § 2, p. 118, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A third former section which comprised I.C., § 18-803, as added by 1971, ch. 143, § 1 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Cross ref. Electrical transmission plants and lines, burning or destruction of a felony, §§ 18-6803 — 18-6805.

Mines, burning underground workings of, a felony, §§ 18-7024, 18-7025.

Timber and prairies, violation of law for protection against fire, a misdemeanor, § 18-7004.

Forest fires, precautions against and regulations regarding, § 38-107 et seq.

Idaho Arson and Fraud Reporting-Immunity Act, §§ 41-290 — 41-298.

Uniform fire code, § 41-253 et seq.

Sec. to sec. ref. This section is referred to in §§ 18-805, 18-7803.

Cited in: *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002).

Constitutionality.

The defendant's allegation that this section was constitutionally invalid because it was vague and overbroad failed because the defendant did not raise the matter before the trial court through any motion to dismiss or other pretrial procedures; therefore, the matter could not be considered on appeal. *State v. Fox*, 130 Idaho 385, 941 P.2d 357 (Ct. App. 1997).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Erroneous charge.

Sentencing.

Erroneous Charge.

Charge and conviction of burning "bean hay" will not be sustained by evidence that substance destroyed was residue after beans or seed had been removed by threshing. *State v. Choate*, 41 Idaho 251, 238 P. 538 (1925).

Sentencing.

Where defendant was sentenced to a five-year unified sentence with two-years fixed and three-years indeterminate for burning property not subject to arson, and two one-year terms for firing timber or prairie lands, all to run concurrently, and during the period of retained jurisdiction, the judge decided to decrease the term of the fixed sentence to one year with four-years indeterminate because of defendant's performance in a special program, although the one-year sentence for firing of timber appeared to be illegal, because the sentence ran concurrently with the sentence for burning property not subject to arson, the issue of the illegal sentence was

moot, and the other sentence was found to be reasonable in light of the potential danger to property and human life caused by the fire. *State v. Goodson*, 122 Idaho 553, 835 P.2d 1364 (Ct. App. 1992).

Collateral References. 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq.

6A C.J.S., Arson, §§ 4—22.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1322.

"Outhouse" or "outbuilding," what is. 20 A.L.R. 234.

Evidence of other offenses in prosecution for. 63 A.L.R. 605.

Entrapment to commit crime. 66 A.L.R. 483; 86 A.L.R. 263.

Vacancy or nonoccupancy of building as affecting its character as "dwelling." 44 A.L.R.2d 1456.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires. 87 A.L.R.2d 891.

What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

18-804. Arson in the third degree — Burning of real or personal property or forest land — Penalties. — Any person who willfully and unlawfully, by fire or explosion, damages:

(1) Any real or personal property of another; or

(2) Any forest land;

is guilty of arson in the third degree, and upon conviction thereof shall be sentenced to the custody of the department of correction for not more than ten (10) years or fined not more than fifty thousand dollars (\$50,000) or both. [I.C., § 18-804, as added by 1993, ch. 107, § 5, p. 273.]

Compiler's notes. Former § 18-804, which comprised (I.C., § 18-804, as added by 1972, ch. 336, § 1, p. 844), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

Another former section, which comprised I.C.A., § 17-3313, as added by 1939, ch. 67, § 2, p. 118, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-804, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the former section added by S.L. 1972, ch. 336, § 1 contained the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Electrical transmission plants and lines, burning or destruction of a felony, §§ 18-6803 — 18-6805.

Mines, burning underground workings of, a

felony, §§ 18-7024, 18-7025.

Timber and prairies, violation of law for protection against fire, a misdemeanor, § 18-7004.

Forest fires, precautions against and regulations regarding, § 38-107 et seq.

Idaho Arson and Fraud Reporting-Immunity Act, §§ 41-290 — 41-298.

Uniform fire code, § 41-253 et seq.

Sec. to sec. ref. This section is referred to in § 18-7803.

Collateral References. 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq.

6A C.J.S., Arson, §§ 4—22.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1322.

"Outhouse" or "outbuilding," what is. 20 A.L.R. 234.

Evidence of other offenses in prosecution for. 63 A.L.R. 605.

Entrapment to commit crime. 66 A.L.R. 483; 86 A.L.R. 263.

Vacancy or nonoccupancy of building as affecting its character as "dwelling." 44 A.L.R.2d 1456.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires. 87 A.L.R.2d 891.

What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

18-805. Aggravated arson — Penalties. — A person whose violation of sections 18-802, 18-803 or 18-804, Idaho Code, results, directly or indirectly, in great bodily harm, permanent disability, permanent disfigurement or death of a firefighter or any other person, regardless of intent or lack of intent to cause such harm, upon a finding of guilt thereon shall be sentenced to an extended term of imprisonment. The extended term of imprisonment shall be computed by increasing the sentence imposed for a conviction under such sections, by a period of not more than ten (10) years. [I.C., § 18-805, as added by 1993, ch. 107, § 6, p. 273.]

Compiler's notes. Former § 18-805, which comprised (I.C., § 18-805, as added by 1987, ch. 230, § 1, p. 486), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

Another former § 18-805 which comprised I.C., § 18-805, as added by S.L. 1971, ch. 143, § 1, p. 630, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Section 7 of S.L. 1993, ch. 107 contained a repeal.

Sec. to sec. ref. This section is referred to in §§ 18-7803, 19-5307 and 19-5506.

Cited in: State v. Brizendine, 123 Idaho 886, 853 P.2d 631 (Ct. App. 1993).

In General.

Aggravated first degree arson is not a lesser included offense of felony murder, but is merely an aggravated form of first degree arson which provides for enhanced punishment in accordance with the aggravating factors set forth in this section. State v. Payne, 134 Idaho 423, 3 P.3d 1251 (2000).

18-806. Criminal coercion. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-806, as added by 1971,

ch. 143, § 1, p. 630 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

CHAPTER 9

ASSAULT AND BATTERY

SECTION.

- 18-901. Assault defined.
- 18-902. Assault — Punishment.
- 18-903. Battery defined.
- 18-904. Battery — Punishment.
- 18-905. Aggravated assault defined.
- 18-906. Aggravated assault — Punishment.
- 18-907. Aggravated battery defined.
- 18-908. Aggravated battery — Punishment.
- 18-909. Assault with intent to commit a serious felony defined.
- 18-910. Assault with the intent to commit a serious felony — Punishment.
- 18-911. Battery with the intent to commit a serious felony defined.
- 18-912. Battery with the intent to commit a serious felony — Punishment.

SECTION.

- 18-913. Felonious administering of drugs defined.
- 18-914. Felonious administering of drugs — Punishment.
- 18-915. Assault or battery upon certain personnel — Punishment.
- 18-915A. Removing a firearm from a law enforcement officer.
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- 18-916. Abuse of school teachers.
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- 18-919. Sexual exploitation by a medical care provider.
- 18-920. Violation of no contact order.

SECTION.

18-921. Peace officers — Immunity.

18-922. Order — Transmittal to law enforcement agency.

18-901. Assault defined. — An assault is:

(a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or

(b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. [I.C., § 18-901, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former sections 18-901 — 18-913 which comprised I.C., §§ 18-901 — 18-912, as added by S.L. 1972, ch. 336, § 1, p. 844; I.C., § 18-913, as added by S.L. 1974, ch. 198, § 1, p. 1515; am. S.L. 1976, ch. 144, § 1, p. 529, were repealed by S.L. 1979, ch. 227, § 1.

Other former §§ 18-901 — 18-911, which comprised Cr. & P. 1864, §§ 41, 46-48; R.S., R.C., C.L., §§ 6703-6706; 6727-6732, 7211; C.S., §§ 8231-8234, 8247-8252, 8590; I.C.A., §§ 17-1201 — 17-1210, 17-4604, were repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972. Also former sections which comprised I.C., §§ 18-901 — 18-911, as added by S.L. 1971, ch. 143, § 1. However, these sections were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

Cross ref. Husband or wife may testify in prosecution for crime committed by one against the person of the other, § 9-203.

Medical examination of victim, cost paid by law enforcement agency, § 19-5303.

Sec. to sec. ref. This chapter is referred to in § 18-7905, 37-1926.

This section is referred to in §§ 18-915, 18-918 and 18-920.

Cited in: State v. Hoffman, 104 Idaho 510, 660 P.2d 1353 (1983); State v. Major, 111 Idaho 410, 725 P.2d 115 (1986); State v. McDougall, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988); State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988); State v. Marchant, 115 Idaho 403, 766 P.2d 1284 (Ct. App. 1989); State v. Pugsley, 119 Idaho 62, 803 P.2d 563 (Ct. App. 1991); State v. Fee, 124 Idaho 170, 857 P.2d 649 (Ct. App. 1993); State v. Leach, 126 Idaho 977, 895 P.2d 578 (Ct. App. 1995); State v. Medina, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996); State v. Hudson, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996); Butler v. State, 129 Idaho 899, 935 P.2d 162 (1997); State v. Page, 135 Idaho 214, 16 P.3d 890 (2000); Jakoski v. State, 136 Idaho 280, 32 P.3d 672 (Ct. App. 2001); State v. Pole, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003); State v. Rae, — Idaho —, 84 P.3d 586 (Ct. App. 2004).

ANALYSIS

Deadly weapon.

Evidence.

— In general.

— Sufficient.

Included offense.

Indictment and information.

Instructions.

Prior acts.

Prosecutorial misconduct.

Sentence.

Deadly Weapon.

Legislative policy expressed within this section and § 18-905 evidenced an intent that it was a victim's reasonable perception that was dispositive of the question of whether a weapon was deadly. State v. Cudd, 137 Idaho 625, 51 P.3d 439 (Ct. App. 2002).

Evidence.**— In General.**

In prosecution for aggravated assault on a law enforcement officer, the admission of the defendant's blood alcohol test result, even if error, was harmless, where testimony was adduced, without objection, that the defendant had been consuming alcoholic beverages and the test result simply confirmed that undisputed fact, and the evidence of intoxication actually could have been exculpatory under the instructions the trial court gave the jury on intent. State v. Missamore, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

— Sufficient.

Where the testimony, albeit somewhat controverted, was that defendant entered the victim's residence uninvited and beat the victim on the head with a beer bottle when the victim objected, and the defendant did not deny the assault, the evidence amply sustained the conviction. State v. Larson, 109 Idaho 868, 712 P.2d 569 (1985).

When a defendant carries a loaded gun during a burglary attempt, he has already completed any requirement regarding mere preparation, and the act of drawing the

weapon and pointing it toward an individual, or where an individual is expected or known to be, goes beyond mere preparation and goes to the intent to inflict "a violent injury on the person of another." *State v. Daniels*, 134 Idaho 896, 11 P.3d 1114 (2000).

Evidence was sufficient to convict defendant of attempted assault when he threatened three boys and maneuvered his car as if to assault them, even though the car became hung up on a rock; the jury was properly instructed as to the mens rea of the offense. *State v. Broadhead*, — Idaho —, 84 P.3d 599 (Ct. App. 2004).

Included Offense.

An assault is a necessarily included offense of battery; an aggravated assault is a necessarily included offense of aggravated battery. *State v. Eisele*, 107 Idaho 1035, 695 P.2d 420 (Ct. App. 1985).

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon, aiming a firearm at others, and discharge of arms aimed at another were lesser included offenses which the district court was obligated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of § 19-2132(c). Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault (a lesser included offense than the one charged of assault with intent to commit a serious felony). *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

Indictment and Information.

Where the information filed in an aggravated assault prosecution contained a plain, concise, and definite statement of the essential facts constituting the offense charged, the failure of the information to list the precise subsections of the statutes that the defendant was alleged to have violated did not render the information legally insufficient. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

Where although the judge did not explicitly define the intent element of the alleged crime but did state the offense charged and enunciated defendant's rights, including the right to insist that the state meet its burden of proof and also asked the prosecutor to narrate the underlying facts which he did, defendant was informed of the gravamen of the charge against him and was adequately informed of the nature of the charge, aggravated assault. *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988).

Instructions.

In prosecution for aggravated assault, the evidence did not require the court to give the

requested instruction on assault, where the defendant admitted holding the gun but denied pointing it or making a threatening statement. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Defendant's conviction was vacated because the statement in the jury instruction that "upon a showing of criminal negligence, the law will impute or attribute to the defendant a willful intention even though he may not in fact have entertained such intention" diminished the state's burden on the mental element of assault under subsection (b) and, in effect, modified the mens rea element from intent to negligence. *State v. Crowe*, 135 Idaho 43, 13 P.3d 1256 (Ct. App. 2000).

Court was not required to instruct the jury, and the state was not required to prove beyond a reasonable doubt, that defendant intended to cause apprehension in the victim; to convict defendant of aggravated assault the state needed only to prove, under subsection (b), defendant's intent to threaten by word or act, and not a separate specific intent to cause apprehension in the victim. *State v. Dudley*, 137 Idaho 888, 55 P.3d 890 (Ct. App. 2002).

Because a jury instruction defined assault and battery pursuant to §§ 18-901 and 18-903 and identified the specific mental states required for commission of the crimes, there was no need for a further instruction based on § 18-114 to inform the jury of the required mental elements. *State v. Hoffman*, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

Prior Acts.

Where defendant's prior bad acts of stalking and harassing defendant's girlfriend were not similar to the aggravated assaults committed against police officers, the admission of the acts was erroneous but harmless. *State v. Alsanea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003).

Prosecutorial Misconduct.

In prosecution for aggravated assault on a law enforcement officer, the prosecutor's remark improperly predicting future confrontations between the defendant and the police was not fundamental error, requiring reversal of the judgment of conviction, where the defendant made no objection to the argument nor did he move for a mistrial or otherwise challenge the comment before the case was submitted to the jury, and the remark was not so egregious or inflammatory that any prejudice arising therefrom could not have been remedied by a ruling from the trial court. *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

Sentence.

The record reveals that the court properly considered the appropriate goals of sentencing when it imposed the five-year term, noted

the violence inherent in defendant's act, and ordered a sentence within the statutory maximum. *State v. Adams*, 120 Idaho 350, 815 P.2d 1090 (Ct. App. 1991).

The 15-year indeterminate part of defendant's sentences was reasonable in light of his numerous prior alcohol-related driving offenses and his extensive history of repetitive unlawful behavior. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

The judge fairly considered each of the sentencing factors in that he noted the defendant undoubtedly had been an outstanding worker who could be a productive member of society but for his alcohol and glue addictions; the protection of society was properly considered to be of primary importance in arriving at an appropriate sentence; defendant was a longtime alcoholic; he had undergone counseling and treatment; he had been given probation, paid fines and been incarcerated several times, and nothing had worked to stop his driving while intoxicated; and no short-term rehabilitative program had been shown to be effective; therefore the five-year minimum

period of incarceration was reasonable for the crime of DUI and aggravated assault. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

The district judge believed that any further reduction in sentence would depreciate the seriousness of the defendant's crime, namely, shooting a pistol at police officers chasing him on foot, regardless of defendant's current institutional adjustment, rehabilitation goals, and conditions at the penitentiary; the reasoning of the judge in denying the Rule 35 motion indicated no abuse of discretion. *State v. White*, 121 Idaho 876, 828 P.2d 905 (Ct. App. 1992).

The district court did not abuse its sentencing discretion when it ordered the execution of a previously imposed sentence and modified the sentence to four years fixed with one-year indeterminate for aggravated assault. The court adequately considered the extent of defendant's mental state when combined with her substance addiction and her extensive record. *State v. Tesheep*, 122 Idaho 759, 838 P.2d 888 (Ct. App. 1992).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Attempt.

Included offense.

Indictment and information.

Instruction.

Rape.

Attempt.

The pointing of a loaded gun, combined with a stated or implied threat, was sufficient to justify a jury's finding of "attempt," even if the threat was a conditional threat. *State v. Mathewson*, 93 Idaho 769, 472 P.2d 638 (1970).

Included Offense.

The language of the charging part of the information, of "assault with intent to commit murder" was sufficient to charge "assault with a deadly weapon," an included offense pursuant to § 19-2312; it clearly appeared that the intent of appellant to do what the jury found he did was sufficiently established by the commission of the acts and circumstances surrounding them. *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963).

An information charging an assault with intent to commit murder by then and there striking, hitting, and beating a person with a heavy stick or club did not charge an assault with means and force likely to produce great bodily injury. *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

The charge that a man committed battery

necessarily included the charge that the battery was preceded by an assault which culminated in the battery. There could be no battery without a previous assault. A person cannot wilfully strike another without making an unlawful attempt to do so. An assault is an inchoate battery. Hence, a complaint charging battery sustains a conviction for assault. *State v. Wilding*, 57 Idaho 149, 63 P.2d 659 (1936).

Indictment and Information.

Crime of assault with deadly weapon is not necessarily included in the statutory definition of murder, and therefore a person cannot be convicted of former crime under information for latter unless information alleges that the murder was committed by an assault with a deadly weapon, or by any means or force likely to produce great bodily injury. In re *McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913); *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

An information charging an assault and battery on a named person by striking, beating, wounding and bruising him until he became unconscious and by reason of which he was permanently injured and suffered a long illness charged a battery. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

Information held defective as not charging statutory elements. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

Instruction.

The following instruction was correct: "A mere threat or menace to do violence, without

any overt attempt to do violence is not an assault; an apparent effort to do violence, without the existence of a present ability at the time to do the violence apparently attempted, would not be an assault; and a gun is not a deadly weapon, within the meaning of this statute, unless it is loaded; consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, within a distance at which the gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant unlawfully attempted to commit such injury by means of such gun." *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912).

Rape.

In prosecution for statutory rape, defendant may be convicted of simple assault. *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928).

Charge of lewd and lascivious conduct on body of female child under age of 16 does not necessarily include assault with intent to rape, but charge of assault with intent to rape minor child does include charge of lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Information, which charged defendant with committing lewd and lascivious acts on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and of said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant under § 18-6607 (now § 18-1508), to-wit lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Collateral References. 6 Am. Jur. 2d, Assault and Battery, § 1, 2.

6A C.J.S., Assault and Battery, § 2.

Acquittal on charge as to one as bar to charge as to the other, where one person is assaulted by acts directed at another. 2 A.L.R. 606.

Assault in attempting to prevent elopement. 8 A.L.R. 660.

Insufficient lighting as proximate cause of assault. 11 A.L.R. 1414.

Assault in connection with use of automobile for unlawful purpose or in violation of law. 16 A.L.R. 914; 21 A.L.R. 1504; 27 A.L.R. 1182; 30 A.L.R. 66; 41 A.L.R. 725; 42 A.L.R.

1120; 46 A.L.R. 1060; 49 A.L.R. 608; 53 A.L.R. 254; 99 A.L.R. 756.

Peace officers' criminal responsibility for wounding one whom they wished to investigate or identify. 18 A.L.R. 1368; 61 A.L.R. 321.

"Infamous offense," assault as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1007.

Assault in defense of habitation or property. 25 A.L.R. 537; 32 A.L.R. 1541; 34 A.L.R. 1488.

Sense of shame, or other disagreeable emotion on part of female, as essential to an aggravated or indecent assault. 27 A.L.R. 859.

Indecent assault, reduction by appellate court of punishment imposed by trial court. 29 A.L.R. 335; 89 A.L.R. 295.

Right of one in loco parentis other than teacher to punish child. 43 A.L.R. 507.

Illegal arrest, right of self-defense by officer attempting. 46 A.L.R. 904.

Self-defense by one who has rightfully entered on premises of his assailant. 53 A.L.R. 486.

Peace bond, assault as breach of. 54 A.L.R. 391.

"Third degree," police officers' criminal liability in respect of examination of persons under arrest. 79 A.L.R. 457.

Automobile, assault in connection with negligent operation of, or its use for unlawful purpose or in violation of law. 99 A.L.R. 835.

Danger or apparent danger or death or great bodily harm as condition of right of self-defense. 114 A.L.R. 634.

Instruction applying rule of reasonable doubt with respect to defendant's claim of self-defense as curing instruction placing burden of proof upon defendant in that regard. 120 A.L.R. 595.

Right to use force to obtain possession of real property to which one is entitled. 141 A.L.R. 273.

Liability for assault by joint adventurer. 30 A.L.R.2d 859.

Attempt to commit assault as criminal offense. 79 A.L.R.2d 597.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 A.L.R.2d 396.

What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability. 99 A.L.R.2d 358.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense. 9 A.L.R.3d 933.

Consent as defense to charge of criminal assault. 58 A.L.R.3d 662.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

18-902. Assault — Punishment. — An assault is punishable by fine not exceeding three hundred dollars (\$300), or by imprisonment in the county jail not to exceed three (3) months, or by both such fine and imprisonment. [I.C., § 18-902, as added by 1979, ch. 227, § 2, p. 624; am. 1982, ch. 246, § 1, p. 633.]

Compiler's notes. Former § 18-902 was repealed, see compiler's notes, § 18-901.

Sec. to sec. ref. This section is referred to in § 19-603.

Cited in: State v. Josephson, 124 Idaho 286, 858 P.2d 825 (Ct. App. 1993).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Discharging firearm.
Information or indictment.

Discharging Firearm.

Firing a shotgun at and toward victim constituted battery. State v. Patterson, 60 Idaho 67, 88 P.2d 493 (1939).

Information or Indictment.

A complaint, charging the accused with battery by wilfully and unlawfully striking

and fighting a certain person, charges an assault and will sustain a conviction for assault, since no battery could be committed without being preceded by assault. State v. Wilding, 57 Idaho 149, 63 P.2d 659 (1936).

Collateral References. 6 Am. Jur. 2d, Assault and Battery, §§ 3, 6, 7.

6A C.J.S., Assault and Battery, § 2.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

18-903. Battery defined. — A battery is any:

(a) Willful and unlawful use of force or violence upon the person of another; or

(b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or

(c) Unlawfully and intentionally causing bodily harm to an individual. [I.C., § 18-903, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-903 was repealed, see compiler's notes, § 18-901.

Sec. to sec. ref. This section is referred to in §§ 18-915, 18-918, 18-920 and 19-603.

Cited in: State v. Tucker, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982); State v. Burroughs, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984); State v. Fink, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985); State v. Major, 111 Idaho 410, 725 P.2d 115 (1986); State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987); State v. Hancock, 112 Idaho 950, 738 P.2d 420 (1987); State v. McDougall, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988); State v. Spurr, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988); State v. Barton, 119 Idaho 114, 803 P.2d 1020 (Ct. App. 1991); State v. Bolton, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991); State v. Hildreth, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991); State v. Stoddard, 122 Idaho 865, 840 P.2d 409 (Ct. App. 1992); State v. Bowman, 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993); State v. Velasquez-Delacruz, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); State v. Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App.

2000); State v. Clark, 135 Idaho 255, 16 P.3d 931 (2000); State v. Hellickson, 135 Idaho 742, 24 P.3d 59 (2001); State v. Larsen, 135 Idaho 754, 24 P.3d 702 (2001); State v. Prather, 135 Idaho 770, 25 P.3d 83 (2001); State v. Pole, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

ANALYSIS

Evidence.
Felony domestic violence.
Included offense.
Informing defendant of offense charged.
Intent.
Jury instructions.
Juveniles.
Sentence.

Evidence.

Evidence that a lawyer touched a client without the solicitation of the client and against the client's wishes and the touching resulted in bruises on the client's arm was sufficient to prove that the lawyer was guilty of battery under subsection (b) of this section.

Idaho State Bar v. Williams, 122 Idaho 404, 834 P.2d 1320 (1992).

Evidence at trial was sufficient to support verdict that defendant used his pickup truck to perpetrate battery upon his wife, where there was evidence that this truck struck vehicle which defendant's wife was driving, for willful use of force or intentional striking of another person that was made criminal by this section (1) could be committed indirectly through intervening agency which defendant set in motion, (2) did not need to be committed directly against alleged victim, and (3) could be committed against anything intimately connected with person of alleged victim. State v. Townsend, 124 Idaho 881, 865 P.2d 972 (1993).

There was sufficient evidence to support defendant's conviction of misdemeanor battery; the victim told police and the jury of defendant's battery, and an officer testified as to the injuries the victim sustained as a result of the battery. State v. Anderson, 138 Idaho 359, 63 P.3d 485 (Ct. App. 2003).

Felony Domestic Violence.

Crime of felony domestic violence under Idaho Code § 18-918(3) requires a person to commit a battery, as defined in Idaho Code § 18-903, and requires that the person willfully inflict a traumatic injury. State v. Reyes, — Idaho —, 80 P.3d 1103 (Ct. App. 2003).

Included Offense.

An assault is a necessarily included offense of battery; an aggravated assault is a necessarily included offense of aggravated battery. State v. Eisele, 107 Idaho 1035, 695 P.2d 420 (Ct. App. 1985).

Informing Defendant of Offense Charged.

Section 19-608 requires that the person be informed of the cause of the arrest and not the charge for which he might eventually be made to answer; thus, although defendant's underlying arrest was validated under a different charge (aggravated battery) than that for which he was originally cited (misdemeanor domestic battery), defendant was informed of the cause of his arrest, the alleged battery committed on his wife, and such arrest was lawful. State v. Julian, 129 Idaho 133, 922 P.2d 1059 (1996).

Intent.

Where defendant insisted 13-year-old girl go upstairs and show him where some towels were, followed her, blocked the hall, pushed her into the bedroom and, pointing to the bed, stated "Right here should be fine," the jury could have reasonably concluded that, by successfully getting away, the girl had escaped being a victim of rape or lewd conduct; thus, defendant was unable to demonstrate on ap-

peal that there was insufficient evidence to support the jury's conviction for battery with the intent to commit a serious felony. State v. Monroe, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996).

Proof of a violation of § 18-903(a) requires a showing that the accused purposely used force or violence upon the victim's body, although it is not necessary that the defendant know that the act is illegal or intend that it cause bodily injury, but only that the defendant intend a forceful or violent contact with the other person, while a conviction for violation of § 18-903(b) requires proof of intent to touch or strike another person, and the intent element to be proved under § 18-903(c) is intent to cause bodily harm to a person; thus, under any of the subsections of § 18-903, an intent to cause physical contact or touching is necessary. State v. Billings, 137 Idaho 827, 54 P.3d 470 (Ct. App. 2002).

Jury Instructions.

Where the district court instructed the jury in an aggravated battery trial on the lesser included offense of injuring another by discharge of an aimed firearm, and also gave the jury an "acquittal first" instruction, the jury's unanimous verdict convicting the defendant of aggravated battery foreclosed it from considering whether he was guilty of any lesser-included offenses, and any potential error in the district court's failure to give requested instructions on additional lesser-included offenses was harmless. State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Because a jury instruction defined assault and battery pursuant to §§ 18-901 and 18-903 and identified the specific mental states required for commission of the crimes, there was no need for a further instruction based on § 18-114 to inform the jury of the required mental elements. State v. Hoffman, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

Juveniles.

Unlike status offenses, for which certain conduct is proscribed only if the actor is a juvenile, the perpetrator's age is not an element of the offense of battery under Idaho Code § 18-903. Where a seventeen-year-old minor committed battery, the State was not required to prove her status as a juvenile at the evidentiary hearing in order to establish her guilt. State v. Doe (In re Doe), — Idaho —, 79 P.3d 165 (Ct. App. 2003).

Sentence.

A unified sentence of 15 years with a minimum period of confinement of ten years for conviction of aggravated battery was not an abuse of discretion where defendant inflicted numerous serious injuries upon the victim, who was his girlfriend, by beating her severely, defendant kicked or stomped on her

with his feet, a glass dining room table was smashed over her body and chairs were piled on top of that, victim was found unconscious in a pool of blood by her landlady and young son, the victim received permanent physical damage and psychological harm and defendant's criminal record consisted of six felony convictions, including sexual assault, breaking and entering and larceny, and 21 misdemeanors. *State v. Burns*, 121 Idaho 788, 828 P.2d 351 (Ct. App. 1992).

Supreme Court in review of denial of I.C.R. 35 motion did not abuse its discretion in not reducing sentence of fifteen years for aggravated battery plus a consecutive enhance of twelve years, where the sentence imposed was within the statutory maximums, where the crime committed involved an act of domestic violence which caused life-threatening harm to defendant's former wife and was committed in the presence of their 14-year-old son, where although alcohol was a factor it could not be used as defense to excuse the actions, where there was no provocation for the attack which was a result of an ongoing cycle of domestic violence that escalated over the years, where the victim impact statement disclosed a long history of abuse and terror

directed at former wife by defendant, where protection of victim and son were viewed as a paramount concern, and where defendant presented no evidence of any serious rehabilitation effort on his part. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

Since a sentencing court may, with due caution, consider the existence of a defendant's alleged criminal activity for which no charges have been filed or where charges have been dismissed, there was no error in sentencing court's determination of the significance to be placed on victim's account of defendant's prior, uncharged criminal acts against her. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

Where district court found that defendant was a multiple offender with prior convictions of voluntary manslaughter and malicious wounding, that he lied in writing to the court regarding his prior offenses, and that he had the potential to inflict serious harm, defendant was unable to show on appeal that his sentence to a fixed term of 15 years for conviction for battery with intent to commit a serious felony was excessive under the facts. *State v. Monroe*, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996).

18-904. Battery — Punishment. — Battery is punishable by a fine not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not to exceed six (6) months, or both unless the victim is pregnant and this fact is known to the batterer, in which case the punishment is by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not to exceed one (1) year, or both. [I.C., § 18-904, as added by 1979, ch. 227, § 2, p. 624; am. 1996, ch. 227, § 1, p. 741.]

Compiler's notes. Former § 18-904 was repealed, see compiler's notes, § 18-901.

Cited in: *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

18-905. Aggravated assault defined. — An aggravated assault is an assault:

- (a) With a deadly weapon or instrument without intent to kill; or
- (b) By any means or force likely to produce great bodily harm.[] or]
- (c) With any vitriol, corrosive acid, or a caustic chemical of any kind.
- (d) "Deadly weapon or instrument" as used in this chapter is defined to include any firearm, though unloaded or so defective that it can not be fired. [I.C., § 18-905, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-905 was repealed, see compiler's notes, § 18-901.

The bracketed material in subdivision (b) was inserted by the compiler.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-920, 19-2520, 19-5307, 19-5506, and 33-1208.

Cited in: *State v. Browning*, 107 Idaho 870, 693 P.2d 1072 (Ct. App. 1984); *State v.*

Galbraith, 111 Idaho 379, 723 P.2d 923 (Ct. App. 1986); *State v. Torres*, 112 Idaho 801, 736 P.2d 853 (Ct. App. 1987); *State v. Pugsley*, 119 Idaho 62, 803 P.2d 563 (Ct. App. 1991); *State v. Fee*, 124 Idaho 170, 857 P.2d 649 (Ct. App. 1993); *State v. Leach*, 126 Idaho 977, 895 P.2d 578 (Ct. App. 1995); *State v. Medina*, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996); *State v. Page*, 135 Idaho 214, 16 P.3d 890 (2000).

ANALYSIS

Constitutionality.

Deadly weapon.

Evidence.

—In general.

—Sufficient.

Firearm.

—Enhancement of sentence.

Included offense.

Information.

Instructions.

Prosecutorial misconduct.

Sentence.

Constitutionality.

This section is not constitutionally defective for failure to define precisely the meaning of a “deadly weapon.” *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

Deadly Weapon.

While the courts are divided on whether a pocket knife represents a “deadly weapon” per se, it is the general rule that a pocket knife may be a deadly weapon, depending on the circumstances of its use. Therefore, where the facts showed that the defendant pointed a pocket knife at two men and threatened to kill them, he was properly convicted of aggravated assault. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

If an assailant uses a deadly weapon without intent to kill, then the crime becomes an aggravated assault. *State v. Olson*, 119 Idaho 370, 806 P.2d 963 (Ct. App. 1991).

Hands, or other body parts or appendages, may not, by themselves, constitute deadly weapons under this section. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993).

Defendant’s post-conviction petition alleged that the information under which he was convicted failed to state a felony offense, as it charged that he committed aggravated assault with a deadly weapon by using his hands to choke the victim and *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993), held that hands and other body parts or appendages may not by themselves be considered deadly weapons; however, since defendant’s appeal from the district court’s decision was final at the time *Townsend* was decided, it did not apply to defendant’s case. *Butler v. State*, 129 Idaho 899, 935 P.2d 162 (1997).

Legislative policy expressed within § 18-901 and this section evidence an intent that it is a victim’s reasonable perception that is dispositive of the question of whether a weapon, such as an unloaded crossbow, is deadly. *State v. Cudd*, 137 Idaho 625, 51 P.3d 439 (Ct. App. 2002).

Evidence.

—In General.

In prosecution for aggravated assault on a law enforcement officer, the admission of the defendant’s blood alcohol test result, even if error, was harmless, where testimony was adduced, without objection, that the defendant had been consuming alcoholic beverages and the test result simply confirmed that undisputed fact, and the evidence of intoxication actually could have been exculpatory under the instructions the trial court gave the jury on intent. *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

—Sufficient.

In prosecution for aggravated battery and aggravated assault, sufficient proof was presented for the jury to find beyond a reasonable doubt that the defendant acted in violation of the law and that he harbored the intent necessary to violate the laws, where he precipitated the conflict by confronting his parents, he discharged his weapon at persons in the yard around his home, and, as a result, one law enforcement officer was seriously injured. *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

Where defendant kicked wife one time in the head with his hiking boot and the kick resulted in a cut on wife’s head which required stitches to close, a rational trier of fact could have found beyond a reasonable doubt that the boot was of the type and used in such a manner that was likely to produce death or great bodily injury; therefore, the defendant’s conviction of aggravated assault with a deadly weapon was affirmed. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992).

The state offered sufficient substantial and competent evidence for a jury to convict defendant of aggravated assault on a law officer. *State v. Daniels*, 134 Idaho 896, 11 P.3d 1114 (2000).

Evidence was sufficient to support defendant’s conviction of aggravated battery and assault on a law officer, and there was no abuse of discretion in sentencing given defendant’s criminal history; a jury could have reasonably concluded from the evidence that defendant intended to shoot the officers involved in the altercation, instead of attempting suicide as defendant contended, given the fact that defendant pointed the gun at them when he gained control over it. *State v. Hoffman*, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

Court, in defendant’s aggravated assault case, erred by dismissing the charge where there was probable cause to try defendant on the charge as there was sufficient evidence showing that defendant intended to make a threat to a roommate during a game of Russian roulette by pointing a gun at the room-

mate, and because the roommate was frightened. *State v. Pole*, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

Firearm.

— Enhancement of Sentence.

Where aggravated assault involved a firearm, the enhancement of defendant's sentence for using a firearm did not violate his constitutional right against double jeopardy; the Idaho legislature intended that certain crimes, when committed with a firearm, should receive greater penalties than if no firearm had been used, and the legislature adopted this section and § 19-2520 to achieve this result. *State v. Metzgar*, 109 Idaho 732, 710 P.2d 642 (Ct. App. 1985).

District court should not have instructed the jury on the firearm enhancement by defining a firearm consistent with the definition of a deadly weapon in the aggravated assault statute, Idaho Code § 18-905. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Included Offense.

An assault is a necessarily included offense of battery; an aggravated assault is a necessarily included offense of aggravated battery. *State v. Eisele*, 107 Idaho 1035, 695 P.2d 420 (Ct. App. 1985).

Because the use of a pistol was recited in the elements of the aggravated assault and also appeared in the kidnapping enhancement as charged, the aggravated assault charge was an included offense of the kidnapping charge and the separate conviction for aggravated assault must be vacated. *State v. Bryant*, 127 Idaho 24, 896 P.2d 350 (Ct. App. 1995).

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon, aiming a firearm at others, and discharge of arms aimed at another were lesser included offenses which the district court was obligated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of § 19-2132(c). Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault (a lesser included offense than the one charged of assault with intent to commit a serious felony). *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

Information.

Where the information filed in an aggravated assault prosecution contained a plain, concise, and definite statement of the essential facts constituting the offense charged, the failure of the information to list the precise subsections of the statutes that the defendant

was alleged to have violated did not render the information legally insufficient. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

Where although the judge did not explicitly define the intent element of the alleged crime but did state the offense charged and enunciated defendant's rights, including the right to insist that the state meet its burden of proof and also asked the prosecutor to narrate the underlying facts which he did, defendant was informed of the gravamen of the charge against him and was adequately informed of the nature of the charge, aggravated assault. *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988).

Instructions.

In prosecution for aggravated assault, the trial court did not err in refusing to give the requested self-defense instructions where any threat to the defendant had subsided when the victim left his presence; thus, he was not "about to be injured" and lawful resistance was unnecessary. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

In prosecution for aggravated assault, the evidence did not require the court to give the requested instruction on assault, where the defendant admitted holding the gun but denied pointing it or making a threatening statement. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

In prosecution for aggravated assault, the trial court erred in refusing to give the exhibiting a deadly weapon instruction requested by the defendant, where the jury could have concluded that the defendant — not acting in self-defense — and in the presence of at least four witnesses exhibited his revolver in a rude, angry and threatening manner. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Defendant's conviction was vacated because the statement in the jury instruction that "upon a showing of criminal negligence, the law will impute or attribute to the defendant a willful intention even though he may not in fact have entertained such intention" diminished the state's burden on the mental element of assault under § 18-901(b) and in effect modified the mens rea element from intent to negligence. *State v. Crowe*, 135 Idaho 43, 13 P.3d 1256 (Ct. App. 2000).

Prosecutorial Misconduct.

In prosecution for aggravated assault on a law enforcement officer, the prosecutor's remark improperly predicting future confrontations between the defendant and the police was not fundamental error, requiring reversal of the judgment of conviction, where the defendant made no objection to the argument nor did he move for a mistrial or otherwise challenge the comment before the case was

submitted to the jury, and the remark was not so egregious or inflammatory that any prejudice arising therefrom could not have been remedied by a ruling from the trial court. *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

Sentence.

The defendant's five-year indeterminate sentence for aggravated assault was not an abuse of discretion, despite factors which mitigated against imposing a maximum sentence, where the defendant had previously been convicted of other felonies and had a history of probation violations. *State v. Bell*, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988).

Where defendant, convicted of aggravated assault, second degree kidnapping, misdemeanor battery, and use of a firearm in the commission of a crime, had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for rehabilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

The record reveals that the court properly considered the appropriate goals of sentencing

when it imposed the five-year term, noted the violence inherent in defendant's act, and ordered a sentence within the statutory maximum. *State v. Adams*, 120 Idaho 350, 815 P.2d 1090 (Ct. App. 1991).

The 15-year indeterminate part of defendant's sentences was reasonable in light of his numerous prior alcohol-related driving offenses and his extensive history of repetitive unlawful behavior. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

The judge fairly considered each of the sentencing factors in that he noted the defendant undoubtedly had been an outstanding worker who could be a productive member of society but for his alcohol and glue addictions; the protection of society was properly considered to be of primary importance in arriving at an appropriate sentence; defendant was a longtime alcoholic; he had undergone counseling and treatment; he had been given probation, paid fines and been incarcerated several times, and nothing had worked to stop his driving while intoxicated; and no short-term rehabilitative program had been shown to be effective; therefore, the five-year minimum period of incarceration was reasonable for the crime of DUI and aggravated assault. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

The district court did not abuse its sentencing discretion when it ordered the execution of a previously imposed sentence and modified the sentence to four years fixed with one-year indeterminate for aggravated assault. The court adequately considered the extent of defendant's mental state when combined with her substance addiction and her extensive record. *State v. Tesheep*, 122 Idaho 759, 838 P.2d 888 (Ct. App. 1992).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Assault by pointing pistol.
Evidence of prior conduct.
Included offense.
Indictment and information.
Information.
In general.
Instructions.
Lesser included offenses.
Performance of police duties.
Sentence.
Voluntariness of plea.

Assault by Pointing Pistol.

In prosecution for assault by pointing pistol, state must show that pistol was loaded at time it was pointed. *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912); *State v. Bush*, 50 Idaho 166, 295 P. 432 (1930).

Evidence of Prior Conduct.

In prosecution of tribal game warden for assault with a dangerous and deadly weapon, evidence tending to show that defendant had either expressly or impliedly threatened to use a firearm or actually pointed a firearm at persons trespassing on the reservation was properly admitted as bearing on defendant's intent and state of mind. *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975).

Included Offense.

Where the information charged an aggravated battery, committed by defendant with premeditated design and by means calculated and likely to inflict great bodily injury, the information was sufficient to charge an aggravated assault as well as aggravated battery; the assault having been alleged as the manner and means of the commission of the

aggravated battery, it was an included offense and the information, therefore, was not duplicitous. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Indictment and Information.

Crime of assault with deadly weapon is not necessarily included in statutory definition of murder, and therefore a person cannot be convicted of former crime under an information for latter, unless information alleges that the murder was committed by an assault with a deadly weapon, or by a means or force likely to produce great bodily injury. In *re McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913); *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

The court held that charging part of information does not mention elements of an assault found in the statutory definition, but does charge battery. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

Demurrer to information charging assault with two deadly weapons, on ground that it stated two offenses, should not be sustained. *State v. Bush*, 50 Idaho 166, 295 P. 432 (1930).

The language of the charging part of the information, of "assault with intent to commit murder" was sufficient to charge "assault with a deadly weapon," an included offense pursuant to § 19-2312; it clearly appeared that the intent of appellant to do what the jury found he did was sufficiently established by the commission of the acts and circumstances surrounding them. *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963).

The fact that information did not separately name the offenses of assault with intent to murder and assault with a deadly weapon in no way prejudiced defendant. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Information.

An information which charged that the defendant assaulted the prosecuting witness "with the premeditated design then and there had, by a use and means calculated to inflict great bodily injury ... by striking and beating him with his hands and fists and by kicking" him was sufficient as against demurrer. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

In General.

Assault, if committed with a deadly weapon or by means of force likely to produce bodily injury, is an assault with a deadly weapon and punishable as such. It may be committed without wilful intent if perpetrator be guilty of criminal negligence in the use of the weapon or force whereby it is committed.

State v. Patterson, 60 Idaho 167, 88 P.2d 493 (1939).

Instructions.

Failure of court to give instruction as to disparity of age and physical condition of the parties to an affray, justifying the weaker and older party in using a weapon to defend himself, was not reversible error, where the jurors had both parties before them and were qualified to determine whether the defendant, being the older was the weaker of the two and was justified in using the force and means used. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Where a considerable disparity is revealed by the evidence or the appearance of the parties, the court may, in its discretion, instruct on the disparity in the ages and physical conditions of the parties to the affray and that such disparity might justify the weaker in using a weapon to defend himself though the other party be unarmed. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Lesser Included Offenses.

Assault with a deadly weapon is not "necessarily committed" in the commission of attempted rape, because attempted rape is not always committed with a deadly weapon nor is attempted rape necessarily committed in an assault with a deadly weapon, because such an assault is not always committed with an intent to rape; thus, where neither crime was alleged, in the prosecutor's information, to be the means or an element of the commission of the other, assault with a deadly weapon was not an included offense of the attempted rape. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Performance of Police Duties.

In prosecution of tribal game warden for assault with a dangerous and deadly weapon, evidence that defendant pointed a loaded automatic pistol at non-Indian who had trespassed onto Indian reservation for the purpose of crossing over onto public land supported trial court's finding that defendant's conduct went beyond the force necessary to carry out his duty as a game warden. *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975).

Sentence.

Where the sentence imposed is within the statutory limits, defendant has the burden of showing a clear abuse of discretion, which is dependent upon the circumstances of each case. *State v. Chapa*, 98 Idaho 54, 558 P.2d 83 (1976).

Where a presentence report in a prosecution for robbery and assault with a deadly weapon did not make clear the number of felonies with which the defendant had previ-

ously been charged but did establish three previous felony convictions, the error, if any, was not prejudicial. *State v. Jagers*, 98 Idaho 779, 572 P.2d 882 (1977).

Despite court's acknowledgment that two-year prison sentence given to defendant convicted of aggravated battery of infant daughter under former law, defining aggravated assault and battery and providing punishment therefor, would be of no rehabilitative value, sentence was not improper inasmuch as it was well within the three-year statutory maximum provided in former law and was imposed in order to deter others from committing similar offenses. *State v. Adams*, 99 Idaho 75, 577 P.2d 1123 (1978).

Where, even though defendant's criminal record was clean during the years immediately preceding the crimes charged, he had previously been convicted of multiple felony and misdemeanor charges, had been incarcerated numerous times, and had suffered from an uncontrollable alcohol problem, and where his crime was of a violent nature, involving the firing of some 16 rounds of ammunition at two police officers and defendant's mother, there was no abuse of discretion in imposing maximum five-year sentence for each of two counts of assault with a deadly weapon and an additional five years under § 19-2520. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982).

Voluntariness of Plea.

Where information specifically alleged that defendant "intentionally" attempted to rape

the victim, where there was no assertion that defendant was not conversant with the English language nor was he a stranger to the charge of attempted rape, having been previously convicted of attempted rape and forcible rape, and where details of assault were fully explored at preliminary hearing, defendant was made aware, before pleading guilty, of evidence the state could offer at trial to prove both the acts and the intent comprising the attempted rape, and the district court did not err in determining that, under both the federal and state standards, pleas of guilty to attempted rape and assault with a deadly weapon were voluntary. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Collateral References. 6 Am. Jur. 2d, Assault and Battery, §§ 34—42.

6A C.J.S., Assault and Battery, §§ 72, 77—80.

Firearm used as bludgeon as a deadly weapon. 8 A.L.R. 1319.

Cane as a deadly weapon. 30 A.L.R. 815.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon. 92 A.L.R.2d 635.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 19 A.L.R.5th 823.

18-906. Aggravated assault — Punishment. — An aggravated assault is punishable by imprisonment in the state prison not to exceed five (5) years or by fine not exceeding five thousand dollars (\$5,000) or by both. [I.C., § 18-906, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-906 was repealed, see compiler's notes, § 18-901.

Cross ref. Aiming firearms, §§ 18-3304, 18-3305.

Concealed weapons, carrying under influence of alcohol or drugs, § 18-3302B.

Discharge of firearm at dwelling house, occupied building, vehicle or mobile home unlawful, § 18-3317.

Exhibition of deadly weapons, § 18-3303.

Minor, possession of weapons by, §§ 18-3302E, 18-3302F.

Minor, sale of weapons to, § 18-3302A.

Minor, selling of explosives, ammunition or firearms to, § 18-3308.

Possession of deadly weapons, § 18-3303.

Possession of deadly weapon with intent to assault, § 18-3301.

Prohibited conduct by person obtaining license to carry a concealed weapon, § 18-3302C.

School property, carrying weapons on, § 18-3302D.

Unlawful possession of a firearm, § 18-3316.

Cited in: *State v. Cardona*, 102 Idaho 668, 637 P.2d 1164 (1981); *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985); *State v. Galbraith*, 111 Idaho 379, 723 P.2d 923 (Ct. App. 1986); *State v. Page*, 135 Idaho 214, 16 P.3d 890 (2000); *State v. Alsanea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003).

ANALYSIS

Offense.

— Lesser included.

Sentence.

Offense.

— Lesser Included.

Where there was only one event, defendant's shooting at victim's door, on which

charges could be based, the charge of assault with a deadly weapon was a lesser included offense in a charge of attempted robbery, such as to preclude conviction of both charges under the double jeopardy clause of the fifth amendment of the United States Constitution and the Idaho Constitution. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

An assault is a necessarily included offense of battery; an aggravated assault is a necessarily included offense of aggravated battery. *State v. Eisele*, 107 Idaho 1035, 695 P.2d 420 (Ct. App. 1985).

Sentence.

Since penalty for attempted robbery is half of sentence for robbery, which is imprisonment for five years to life, while punishment for assault with a deadly weapon is not more than five years, assault could not be considered the greater offense on the grounds that it carried greater penalty. Although half of life sentence cannot be calculated, court can set base maximum sentence at less than life and use such maximum to determine the sentence for attempt so that actual sentence fixed for attempted robbery may be less than sentence for assault with deadly weapon. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

An indeterminate sentence of three years' confinement to run concurrently with a previous conviction was well within the discretion of the sentencing court in view of the defendant's previous record and the presentence report. *State v. Larson*, 109 Idaho 868, 712 P.2d 569 (1985).

A maximum sentence of a fixed period of five years, where the actual period of imprisonment would be approximately three and two-thirds years, imposed where following plea negotiations, defendant who was initially charged with assault accompanied by intent to commit a serious felony and with attempted rape entered a plea of guilty of aggravated assault, was not an abuse of sentencing discretion, where defendant entered residence with intent to commit burglary and upon confronting victim brandished a gun and threatened her with rape, even though defendant had suffered a troubled childhood, the death of his mother, the contribution of alcohol to his behavior and had no prior felonies as an adult and the fact that he did not physically harm the victim and had compassion when she became ill. *State v. Torres*, 112 Idaho 801, 736 P.2d 853 (Ct. App. 1987).

Although, in prosecution for aggravated assault and aggravated battery, it was the defendant's first criminal conviction, it involved a particularly serious and violent series of offenses which resulted in probable permanent injury to one victim, and a diminished capacity to act rationally does not excuse the crime; therefore, the district court did not

abuse its discretion in giving an indeterminate 15-year sentence for the battery and indeterminate five-year sentences for the assaults—all to run concurrently. *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

Where defendant charged with aggravated assault was sentenced to a five-year indeterminate sentence, of which defendant would serve at least 20 months in confinement since the result of defendant's action in firing the gun easily could have been a homicide and his presentence report revealed a long string of minor crimes and the trial judge noted the seriousness of the offense, as well as defendant's prior record, acknowledged the role played by alcohol in defendant's misconduct and concluded that incarceration was the only sentencing alternative reasonably available to protect society from further danger, the reasons given by the judge for the sentence he imposed were sound and there was no abuse of sentencing discretion. *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988).

A trial court did not abuse its discretion by imposing a five-year minimum period of confinement which was equal to the maximum punishment allowed for aggravated assault in light of the court's concern for the defendant's history of violent crime and the fact that defendant was on parole when he committed the charged offense. *State v. Gibson*, 116 Idaho 265, 775 P.2d 157 (Ct. App. 1989).

Where defendant, convicted of aggravated assault, second degree kidnapping, misdemeanor battery, and use of a firearm in the commission of a crime, had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for rehabilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

The record reveals that the court properly considered the appropriate goals of sentencing when it imposed the five-year term, noted the violence inherent in defendant's act, and ordered a sentence within the statutory maximum. *State v. Adams*, 120 Idaho 350, 815 P.2d 1090 (Ct. App. 1991).

A unified sentence of five years with a fixed

two-year period of confinement for one count of aggravated assault was confirmed, where defendant, who had an extensive history with the criminal justice system, entered his estranged wife's house, became extremely upset

at the sight of his wife and children in the company of another man, chased the man with a butcher knife, and struck his estranged wife. *State v. Cortez*, 122 Idaho 439, 835 P.2d 674 (Ct. App. 1992).

18-907. Aggravated battery defined. — (1) A person commits aggravated battery who, in committing battery:

- (a) Causes great bodily harm, permanent disability or permanent disfigurement; or
- (b) Uses a deadly weapon or instrument; or
- (c) Uses any vitriol, corrosive acid, or a caustic chemical of any nature; or
- (d) Uses any poison or other noxious or destructive substance or liquid; or
- (e) Upon the person of a pregnant female, causes great bodily harm, permanent disability or permanent disfigurement to an embryo or fetus.

(2) For purposes of this section the terms “embryo” or “fetus” shall mean any human in utero.

(3) There shall be no prosecution under subsection (1)(e) of this section:

(a) Of any person for conduct relating to an abortion for which the consent of the pregnant female, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law.

(b) Of any person for any medical treatment of the pregnant female or her embryo or fetus; or

(c) Of any female with respect to her embryo or fetus.

(4) Nothing in this chapter is intended to amend or nullify the provisions of chapter 6, title 18, Idaho Code. [I.C., § 18-907, as added by 1979, ch. 227, § 2, p. 624; am. 2002, ch. 330, § 4, p. 935; am. 2002, ch. 337, § 2, p. 953.]

Compiler's notes. Former § 18-907 was repealed, see compiler's notes, § 18-901.

This section was amended by two 2002 acts. Section 2 of S.L. 2002, ch. 337 amended this section as it read following the amendment of the section by section 4 of S.L. 2002, ch. 330.

The 2002 amendment by ch. 330, § 4, effective July 1, 2002, added subsections (1)(e) through (4).

The 2002 amendment by ch. 337, § 2, effective July 1, 2002, in subsection (3), substituted “There” for “Nothing in this section” and “no” for “construed to permit the” near the beginning and added “under subsection (1)(e) of this section” at the end.

Section 3 of S.L. 2002, ch. 330 is compiled as § 18-4016.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-920, 19-2520, 19-5307, 19-5506, 20-525A and 33-1208.

Cited in: *State v. Fink*, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985); *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985); *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985); *State v. Hancock*, 112 Idaho 950, 738 P.2d 420 (1987); *State v. Stoddard*, 122 Idaho 865, 840 P.2d 409 (Ct. App. 1992); *State v. Warren*, 123 Idaho 20, 843 P.2d 170 (Ct. App. 1992); *State v. Carlson*, 134 Idaho

389, 3 P.3d 67 (Ct. App. 2000); *State v. Lopez*, — Idaho —, 77 P.3d 124 (Ct. App. 2003).

ANALYSIS

Deadly weapon or instrument.

Evidence.

Federal crime.

“Great bodily harm.”

Informing defendant of offense charged.

Intent.

Jury instruction.

Lesser included offense.

Reversible error.

Sentence.

Deadly Weapon or Instrument.

In determining whether an instrumentality comes within subdivision (b) (now (1)(b)) of this section, the triers of fact must examine the circumstances of its use; thus, where the evidence showed that the defendant inmate swung a sock weighted with batteries at the head of the prison guard, causing a laceration that required fifteen stitches, the evidence was sufficient to enable the jury to determine that the sock weighted with batteries was a “deadly weapon or instrumentality”. *State v. Jones*, 109 Idaho 31, 704 P.2d 363 (Ct. App. 1985).

Although a firearm was not the instrument of physical contact with a battery victim, the jury reasonably could have found that such a weapon was employed to intimidate the victim, causing her to endure physical contacts which she might otherwise have resisted or attempted to evade during defendant's physical contact with her and, under these circumstances, the jury's determination that deadly weapon was used within the meaning of this section was proper. *State v. Cates*, 117 Idaho 90, 785 P.2d 654 (Ct. App. 1989), cert. denied, 117 Idaho 372, 788 P.2d 187 (1990).

The appellate court could not say there was insufficient evidence before the trial jury to support the jury's verdict that a sulphur gun used by an inmate in an assault on a correctional officer was a deadly weapon; the prison doctor testified that the officer's eye could have been permanently disabled and the defendant testified that he used the gun in his left hand and turned his eyes away to avoid injury to his good hand or to his eyes if the gun blew up. *State v. Matthews*, 118 Idaho 659, 798 P.2d 941 (Ct. App. 1990).

Expert testified that the wounds were consistent with those made with a knife and had they been in different locations on victim's chest, her life could have been threatened; therefore, there was substantial evidence upon which the jury could have found beyond a reasonable doubt that defendant had attacked victim with a deadly weapon. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Where the state alleges and proves the use of a deadly weapon as an element of aggravated battery under this section, the nature or extent of the injury suffered by the victim is secondary. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Hands, or other body parts or appendages, may not, by themselves constitute deadly weapons under this section. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993).

Court did not err in giving a jury instruction as to the elements of aggravated battery where evidence indicated that defendant actually, intentionally and unlawfully touched victims with a pistol by placing the barrel of the gun on one victim's forehead and pushed it into the stomach of the other victim, and both victims testified they did not resist or flee for fear of being shot. *State v. Velasquez-Delacruz*, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994).

Evidence.

Even though the doctor was allowed to give his opinion as to whether "great bodily injury (harm)," one of the elements of the aggravated battery charge against the defendant, could have resulted from the victim's injuries, there

was no abuse of discretion that would warrant a reversal of the conviction, where testimony by the doctor, in addition to his opinion, overwhelmingly established that great bodily injury occurred, and the jury was instructed by the judge that it should consider the nature and extent of any injuries in deciding whether those injuries were likely to cause great bodily harm. *State v. Crawford*, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986).

Where the witness's sole intent in entering the motel room, accompanied by a police officer, was simply to get clothes for the victim, there was insufficient evidence to show anything more than de minimis government involvement; therefore, there was no infringement of Fourth Amendment rights, and the witness's testimony was properly admissible. *State v. Crawford*, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986).

In prosecution for aggravated battery and aggravated assault, sufficient proof was presented for the jury to find beyond a reasonable doubt that the defendant acted in violation of the law and that he harbored the intent necessary to violate the laws, where he precipitated the conflict by confronting his parents, he discharged his weapon at persons in the yard around his home, and, as a result, one law enforcement officer was seriously injured. *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

Evidence was sufficient to support the jury's verdict convicting defendant of aggravated battery where the state's evidence included photographs and the testimony of persons who witnessed the altercation at the campground, where a pathologist testified that the victim exhibited extensive bruising to her head, the area of her left eye, lips and neck and that the neck injuries were of "grave concern," "life threatening," and sufficient to cause death, and where defendant himself admitted that he had choked the victim and had forced her to the ground during an altercation. *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989).

Evidence was sufficient to support defendant's conviction of aggravated battery and assault on a law officer in violation of §§ 18-901(b), 18-903, 18-905(a), 18-907(b) [now (1)(b)] and 18-915, and there was no abuse of discretion in sentencing given defendant's criminal history; a jury could have reasonably concluded from the evidence that defendant intended to shoot the officers involved in the altercation, instead of attempting suicide as defendant contended, given the fact that defendant pointed the gun at them when he gained control over it. *State v. Hoffman*, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

Federal Crime.

The Major Crimes Act, 18 U.S.C. § 1153, is preemptive of state jurisdiction with respect

to crimes enumerated therein. Thus, defendant, an enrolled member in the Nez Perce Tribe, was subject to federal prosecution for the crime of aggravated battery, against his child, an enrolled member of the Thlingit Tribe. *State v. Marek*, 112 Idaho 860, 736 P.2d 1314 (1987), *aff'd*, 116 Idaho 580, 777 P.2d 1253 (1989).

"Great Bodily Harm."

Statutory phrase "great bodily harm," as used in the prosecutor's information, was an adequate statement of the essential facts constituting the "aggravated" component of the battery since the statutory phrase set down a statement of an act necessary to constitute the commission of an aggravated battery such as to enable a person of common understanding to know what is intended. *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989).

Informing Defendant of Offense Charged.

Section 19-608 requires that the person be informed of the cause of the arrest and not the charge for which he might eventually be made to answer; thus, although defendant's underlying arrest was validated under a different charge (aggravated battery) than that for which he was originally cited (misdemeanor domestic battery), defendant was informed of the cause of his arrest, the alleged battery committed on his wife, and such arrest was lawful. *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996).

Intent.

Sufficient evidence supported the jury's finding that the State had proved aggravated battery, including the intent element; although there was no direct evidence that defendant intended that his shotgun pellets would strike the victim, facts were presented from which such an intent could be inferred, including the nature of the weapon used, a shot gun which does not fire a bullet but rather a shotgun shell containing scores of pellets that spray out when the weapon is fired, and the defendant's own testimony that he was well-experienced in the use of a shotgun and his acknowledgement that if shotgun pellets hit the ground, "when there's gravel and stuff there, they can ricochet." *State v. Billings*, 137 Idaho 827, 54 P.3d 470 (Ct. App. 2002).

Court properly dismissed defendant's aggravated battery charge where the evidence presented at the preliminary hearing failed to show that defendant knew that the victim was in an adjacent apartment or that defendant intended that someone bear the brunt of the force or violence caused by the firing of the handgun. *State v. Pole*, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

Jury Instruction.

Where the district court instructed the jury in an aggravated battery trial on the lesser included offense of injuring another by discharge of an aimed firearm and also gave the jury an "acquittal first" instruction, the jury's unanimous verdict convicting the defendant of aggravated battery foreclosed the jury from considering whether defendant was guilty of any lesser-included offenses, and any potential error in the district court's failure to give requested instructions on additional lesser-included offenses was harmless. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Lesser Included Offense.

The aggravated battery was not a lesser included offense of murder because a jury reasonably could conclude from the evidence that the victim had suffered an aggravated battery prior to the germination of the idea to murder him. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

The aggravated battery was not a lesser included offense of the kidnapping because the aggravated battery, although sequentially related to the kidnapping, was a separate and distinct crime, requiring elements of proof beyond that required for the kidnapping. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Reversible Error.

Jury instruction which allowed jury to convict defendant of an offense different from which he was charged was reversible error. *State v. Sherrod*, 131 Idaho 56, 951 P.2d 1283 (Ct. App. 1998).

Conviction was vacated where, taking the excessive cross-examination and the final argument of the prosecutor together, it was clear that the prosecution went far beyond use of the post-*Miranda* silence of defendant for any legitimate purpose and sought to establish guilt by defendant's exercise of a constitutional right to remain silent. *State v. Strouse*, 133 Idaho 709, 992 P.2d 158 (1999).

Sentence.

Because the trial judge gave sound reasons for the sentence imposed and because his retained jurisdiction would enable him to modify the sentence in the event the proposed rehabilitative measures were not followed, the defendant's sentence of an indeterminate term of four years for aggravated battery was not excessive. *State v. Burroughs*, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984).

The legislature clearly intended the enhancement provision of § 19-2520 to apply to

aggravated battery committed with a firearm. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

A district judge did not abuse his discretion in sentencing aggravated battery defendant to six years with a four-year minimum period of confinement despite defendant's physical ailments, where defendant had a long-standing problem of alcohol and substance abuse, had a prior criminal record, and was on parole from another state at the time of his conviction. *State v. Rankin*, 115 Idaho 728, 769 P.2d 605 (Ct. App. 1989).

Where defendant admitted to forcing a girl's car off the road, threatening her and stabbing her several times in the back before she freed herself from him, pursuant to an amended information charging him with aggravated battery with an enhancement for the use of a weapon, a sentence of 30 years, with ten years fixed, was not an abuse of discretion. *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

A unified sentence of 15 years with a minimum period of confinement of ten years for conviction of aggravated battery was not an abuse of discretion where defendant inflicted numerous serious injuries upon the victim, who was his girlfriend, by beating her severely, defendant kicked or stomped on her with his feet, a glass dining room table was smashed over her body and chairs were piled on top of that, victim was found unconscious in a pool of blood by her landlady and young son, the victim received permanent physical damage and psychological harm and defendant's criminal record consisted of six felony convictions, including sexual assault, breaking and entering and larceny, and 21 misdemeanors. *State v. Burns*, 121 Idaho 788, 828 P.2d 351 (Ct. App. 1992).

A sentence of 15 years' imprisonment for aggravated battery of another inmate, to be served consecutively to the 75-year sentence defendant was already serving, was affirmed, where the judge noted that the victim had been stabbed multiple times with a sharpened metal object and that defendant's record showed extremely violent past criminal behavior which created the potential for extraordinarily violent harm to other people. *State v. Martinez*, 122 Idaho 629, 836 P.2d 1090 (Ct. App. 1992).

Based upon the facts and circumstances of the offenses and defendant's character, the district court did not clearly abuse its discretion in sentencing defendant or in denying his I.C.R., Rule 35 motion where defendant was convicted of first degree burglary, first degree kidnapping, and aggravated battery against his ex-wife. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

A unified sentence of seven years with one year required as the minimum period of con-

finement for aggravated battery was reasonable where defendant assaulted victim over a traffic dispute, where the victim and defendant were not acquainted with each other prior to this incident and where the victim's medical expenses for his injuries, hospitalization and reconstructive surgery approximated \$20,000. *State v. Davis*, 123 Idaho 970, 855 P.2d 55 (Ct. App. 1993).

Sentence of twelve years, with four years fixed, for aggravated battery was reasonable, and refusal to further reduce the sentence was not an abuse of discretion where defendant had entered victim's apartment and attacked victim who was asleep in her bed, fracturing her nose, breaking her jaw, and causing severe swelling to one side of her face. *State v. Del Rio*, 124 Idaho 52, 855 P.2d 889 (Ct. App. 1993).

Supreme Court in review of denial of I.C.R. 35 motion did not abuse its discretion in not reducing sentence of fifteen years for aggravated battery plus a consecutive enhance of twelve years, where the sentence imposed was within the statutory maximums, where the crime committed involved an act of domestic violence which caused life-threatening harm to defendant's former wife and was committed in the presence of their 14-year-old son, where although alcohol was a factor it could not be used as defense to excuse the actions, where there was no provocation for the attack which was a result of an ongoing cycle of domestic violence that escalated over the years, where the victim impact statement disclosed a long history of abuse and terror directed at former wife by defendant, where protection of victim and son were viewed as a paramount concern, and where defendant presented no evidence of any serious rehabilitation effort on his part. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

Since a sentencing court may, with due caution, consider the existence of a defendant's alleged criminal activity for which no charges have been filed or where charges have been dismissed, there was no error in sentencing court's determination of the significance to be placed on victim's account of defendant's prior, uncharged criminal acts against her. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

There was error in imposing sentence enhancements for use of a deadly weapon in defendant's convictions for involuntary manslaughter and aggravated battery because three of defendant's crimes arose out of the same indivisible course of conduct, and, therefore, he was only subject to one enhanced penalty. *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001).

Prosecutor violated a plea agreement in defendant's aggravated battery case where her comments at the sentencing hearing were

"fundamentally at odds" with the State's promised sentencing recommendation, which called for leniency pursuant to Idaho Code § 19-2601(4), and defendant's sentence was

vacated and he was to be resentenced by different judge. *State v. Jones*, — Idaho —, 77 P.3d 988 (Ct. App. 2003).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Included offense.
Information.
Instructions.
Intent.

Included Offense.

Where the information charged an aggravated battery, committed by defendant with premeditated design and by means calculated and likely to inflict great bodily injury, the information was sufficient to charge an aggravated assault as well as aggravated battery; the assault having been alleged as the manner and means of the commission of the aggravated battery, it was an included offense and the information, therefore, was not duplicious. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Information.

An information which charged that the defendant assaulted the prosecuting witness "with the premeditated design then and there had, by a use and means calculated to inflict great bodily injury ... by striking and beating him with his hands and fists and by kicking" him was sufficient as against demurrer. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Instructions.

Failure of court to give instruction as to disparity of age and physical condition of the

parties to an affray, justifying the weaker and older party in using a weapon to defend himself, was not reversible error, where the jurors had both parties before them and were qualified to determine whether the defendant, being the older was the weaker of the two and was justified in using the force and means used. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Where a considerable disparity is revealed by the evidence or the appearance of the parties, the court may in its discretion, instruct on the disparity in the ages and physical conditions of the parties to the affray and that such disparity might justify the weaker in using a weapon to defend himself though the other party be unarmed. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Intent.

The tenant was entitled to be upon the premises of the farm for all purposes properly connected with his farming operations, and the fact that defendant owner claimed and tenant denied that the latter had abandoned his lease would not affect the issue in an aggravated battery case, particularly in view of the law that abandonment is a question of intent. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Collateral References. 6 Am. Jur. 2d, Assault and Battery, §§ 34—42.

6A C.J.S., Assault and Battery, § 72.

18-908. Aggravated battery — Punishment. — An aggravated battery is punishable by imprisonment in the state prison not to exceed fifteen (15) years. [I.C., § 18-908, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-908 was repealed, see compiler's notes, § 18-901.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: *State v. Grob*, 107 Idaho 496, 690 P.2d 951 (Ct. App. 1984); *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985); *State v. Stoddard*, 122 Idaho 865, 840 P.2d 409 (Ct. App. 1992); *State v. Cagle*, 126 Idaho 794, 891 P.2d 1054 (Ct. App. 1995); *State v. Watts*, 131 Idaho 782, 963 P.2d 1219 (Ct. App. 1998).

ANALYSIS

Discretion of court.
Sentence.

Discretion of Court.

A unified sentence of 15 years with a minimum period of confinement of ten years for conviction of aggravated battery was not an abuse of discretion where defendant inflicted numerous serious injuries upon the victim, who was his girlfriend, by beating her severely, defendant kicked or stomped on her with his feet, a glass dining room table was smashed over her body and chairs were piled on top of that, victim was found unconscious in a pool of blood by her landlady and young son, the victim received permanent physical damage and psychological harm and defendant's criminal record consisted of six felony convictions, including sexual assault, break-

ing and entering and larceny, and 21 misdemeanors. *State v. Burns*, 121 Idaho 788, 828 P.2d 351 (Ct. App. 1992).

Sentence.

Fifteen-year concurrent indeterminate sentences with a five-year indeterminate enhancement for use of a deadly weapon were not excessive when imposed on a defendant who pled guilty to second-degree kidnapping and aggravated battery even though the defendant had no prior record, when considering the brutal nature of the crimes. *State v. Fink*, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985).

Where the crime committed by defendant was the most serious one imaginable for an aggravated battery and there was an abnormally high likelihood of repetitive conduct, given defendant's background and prior criminal record, the district court did not abuse its discretion in ordering a determinate sentence of 15 years. *State v. Thiemann*, 109 Idaho 535, 708 P.2d 940 (Ct. App. 1985).

Where the defendants raped and sodomized a 12-year-old girl, the fixed 30-year sentence for rape, fixed 30-year sentence for lewd conduct with a minor, fixed 15-year sentence for aggravated battery, and the indeterminate 25-year sentence for second degree kidnapping were not an abuse of discretion. *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986).

There was no abuse of discretion in sentencing the defendant to the maximum indeterminate sentences available for the crimes of second-degree kidnapping and aiding and abetting in the commission of aggravated battery, where the court considered the defendant's active participation in the kidnap and murder of the victim, the need for appropriate retribution, and the mitigating factors, including the unusually large number of favorable character attestations on the defendant's behalf. *State v. Hemenway*, 111 Idaho 839, 727 P.2d 1267 (Ct. App. 1986).

The district judge did not abuse his discretion in sentencing the defendant to a ten-year indeterminate sentence for one of the burglaries, a concurrent ten-year fixed sentence for the battery, and a ten-year indeterminate sentence for the other burglary, where the court considered the criteria of protection of society, deterrence of the defendant and of others, retribution, rehabilitation, the defendant's background, and the nature of the crimes to which he had pled guilty. *State v. Reinke*, 111 Idaho 968, 729 P.2d 443 (Ct. App. 1986).

Although, in prosecution for aggravated assault and aggravated battery, it was the defendant's first criminal conviction, it involved a particularly serious and violent series of offenses which resulted in probable perma-

nent injury to one victim, and a diminished capacity to act rationally does not excuse the crime; therefore, the district court did not abuse its discretion in giving an indeterminate 15-year sentence for the battery and indeterminate five-year sentences for the assaults—all to run concurrently. *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

Defendant's sentences for attempted robbery and aggravated battery were not excessive or represent an abuse of discretion where trial judge imposed maximum concurrent sentences, 15 years, for each crime and because defendant used a firearm in committing aggravated battery, the court extended the aggravated battery sentence for an additional 15 years, as permitted by § 19-2520; for each crime the sentencing judge specified that the minimum term of confinement would be the entire length of the sentence and under these sentences defendant must spend 30 years in confinement without the possibility of parole. *State v. Sanchez*, 115 Idaho 394, 766 P.2d 1275 (Ct. App. 1988).

A judgment of conviction imposing a ten-year prison sentence with a five-year minimum confinement period for aggravated battery, and an order denying the defendant's motion for reduction were affirmed where defendant had an extensive criminal history, he was on probation at the time of the offense, he had a substance abuse problem and he had threatened the life of two teenagers with a knife without provocation. *State v. Maxfield*, 115 Idaho 910, 771 P.2d 928 (Ct. App. 1989).

A district judge did not abuse his discretion in sentencing aggravated battery defendant to six years with a four-year minimum period of confinement despite defendant's physical ailments where defendant had a long-standing problem of alcohol and substance abuse, had a prior criminal record, and was on parole from another state at the time of his conviction. *State v. Rankin*, 115 Idaho 728, 769 P.2d 605 (Ct. App. 1989).

Where defendant was convicted of aggravated battery, the three-year minimum period of confinement provided for in defendant's minimum sentence was deemed to give defendant the opportunity to prove his rehabilitation potential to corrections officials, and the judge did not abuse his discretion by imposing a five-year sentence with a minimum period of confinement of three years. *State v. Luna*, 118 Idaho 124, 795 P.2d 18 (Ct. App. 1990).

A 15-year sentence with a ten-year minimum period of confinement for aggravated battery upon a correctional officer, to run consecutively to the indeterminate life sentence already being served by inmate, was not excessive in light of inmate's lengthy disciplinary record while in prison and in light of

the fact that inmate acted deliberately without the slightest provocation. *State v. Matthews*, 118 Idaho 659, 798 P.2d 941 (Ct. App. 1990).

Defendant's five-year sentence was well within the maximum punishment of 15 years which could have been imposed for aggravated battery and in the absence of any factual information to support defendant's ICR 35 motion, beyond the record existing when he was initially sentenced, the Court of Appeals found that the District Court had not abused its discretion by denying the ICR 35 motion. *State v. Prieto*, 120 Idaho 884, 820 P.2d 1241 (Ct. App. 1991).

Where defendant admitted to forcing a girl's car off the road, threatening her and stabbing her several times in the back before she freed herself from him, pursuant to an amended information charging him with aggravated battery with an enhancement for the use of a weapon, a sentence of 30 years, with ten years fixed was not an abuse of discretion. *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

A 15-year unified sentence, with a minimum period of confinement of ten years was reasonable for aggravated battery, where the amended charge of aggravated battery was predicated upon an initial allegation of attempted rape, and defendant was previously charged with aggravated battery against his ex-wife and sexual abuse of his step-daughter. *State v. Barnes*, 121 Idaho 409, 825 P.2d 506 (Ct. App. 1992).

In light of the fact that alcohol treatment had, thus far, been unavailing and that defendant's criminal behavior existed prior to his indulgence in alcohol, the minimum period of confinement imposed by the defendant's sentences was not improper and did not constitute an abuse of discretion. *State v. Cagle*, 126 Idaho 794, 891 P.2d 1054 (Ct. App. 1995).

The maximum sentence for the crime to which defendant was found guilty, including the enhancement for using a firearm, was thirty years; therefore, defendant had the burden of showing a clear abuse of discretion by the trial court in sentencing him. *State v. Morrison*, 130 Idaho 85, 936 P.2d 1327 (1997).

18-909. Assault with intent to commit a serious felony defined. —

An assault upon another with intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or lewd and lascivious conduct with a minor child is an assault with the intent to commit a serious felony. [I.C., § 18-909, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-909 was repealed, see compiler's notes, § 18-901.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-920, 18-8304, 19-2520, 19-5307, 19-5506, 20-5254, and 33-1208.

Cited in: *State v. Hoffman*, 104 Idaho 510, 660 P.2d 1353 (1983); *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988); *State v. Marchant*, 115 Idaho 403, 766 P.2d 1284 (Ct. App. 1989); *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

ANALYSIS

Evidence.
Sentence.

Evidence.

While the state has a duty to use earnest effort to preserve evidence for possible use by

a defendant, the state does not have a general duty to gather evidence for the accused. *State v. Ames*, 109 Idaho 373, 707 P.2d 484 (Ct. App. 1985).

Sentence.

A 15-year fixed term for attempted second degree murder and a consecutive indeterminate ten-year term for assault with intent to commit rape was reasonable where psychologist concluded that defendant was not a good candidate for verbal psychotherapy and even though defendant did not have a long prior record, the record he had was quite serious. *State v. Fenstermaker*, 122 Idaho 926, 841 P.2d 456 (Ct. App. 1992).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Included offense.
Rape.
— Assault with intent to commit.
— Intent to commit.
Sentence.

Included Offense.

Where amended information charged "assault with intent to commit rape," although the attempt was not by means of threat or violence, the means by which the alleged offense was committed also constituted an offense and was sufficiently set forth in the

information as an included offense. *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon, aiming a firearm at others, and discharge of arms aimed at another were lesser included offenses which the district court was obligated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of § 19-2132(c). Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault. *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

Rape.

—Assault with Intent to Commit.

In a prosecution for assault with intent to commit rape on a girl 14 years of age, it was not required to allege nor was it required to prove an assault calculated to overcome the resistance of prosecutrix by force or fear. *State v. Gailey*, 69 Idaho 146, 204 P.2d 254 (1949).

The crime of assault with intent to commit rape is a lesser included offense of rape and, in prosecuting such an assault, the state must prove all elements of rape except penetration. *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982), modified on other grounds, 105 Idaho 43, 665 P.2d 1053 (1983).

—Intent to Commit.

Charge of lewd and lascivious conduct on body of female child under age of 16 does not necessarily include assault with intent to rape, but charge of assault with intent to rape minor child does include charge of lewd and lascivious conduct. *State v. Petty*, 73 Idaho

136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

The offense of "attempt to commit rape" can be included in the charge of "assault with intent to commit rape." *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

Where the defendant restrained the 11-year-old girl by force, and touched her on the thigh with his penis before she escaped, the jury did not unjustifiably infer an intent to have sexual intercourse with the girl. *State v. Greensweig*, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

Sentence.

Where defendant abducted the victim at gunpoint from her car, struck her on the head when she refused to disrobe, and shot her twice when she attempted to escape, consecutive sentences for the maximum term of confinement on respective counts of second degree kidnapping, assault with intent to commit infamous crime against nature, and assault with intent to commit murder were not excessive. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Where defendant's convictions for assault with intent to commit infamous crime against nature and attempt to commit infamous crime against nature arose out of the same act, the sentences imposed would be served concurrently. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Collateral References. Assault with intent to ravish consenting female under age of consent. 81 A.L.R. 599.

Impotency as defense to charge of assault with intent to commit rape. 23 A.L.R.3d 1351.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim. 88 A.L.R.3d 1309.

18-910. Assault with the intent to commit a serious felony — Punishment. — An assault with the intent to commit a serious felony is punishable by imprisonment in the state prison not to exceed ten (10) years. [I.C., § 18-910, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-910 was repealed, see compiler's notes, § 18-901.

Cited in: *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988); *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

Sentence Upheld.

Where defendant was charged with kidnapping and assaulting a nine-year-old girl, with the intent of committing a lewd and lascivious

act, although defendant did not have a criminal record and had a fairly stable family and work history, a sentence of seven years fixed, followed by an indeterminate period of confinement of 13 years on the kidnapping charge, and a term of five years fixed, to be followed by an indeterminate period of five years on the assault charge was not an abuse of discretion. *State v. Soto*, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

18-911. Battery with the intent to commit a serious felony defined. — Any battery committed with the intent to commit murder, rape,

the infamous crime against nature, mayhem, robbery or lewd and lascivious conduct with a minor child is a battery with the intent to commit a serious felony. [I.C., § 18-911, as added by 1979, ch. 227, § 2, p. 624; am. 1981, ch. 263, § 1, p. 559.]

Compiler's notes. Former § 18-911 was repealed, see compiler's notes, § 18-901.

Section 2 of S.L. 1981, ch. 263 is compiled as § 18-915.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-920, 18-8304, 19-2520, 19-5307, 19-5506 and 33-1208.

Cited in: *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985); *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); *State v. Peltier*, 119 Idaho 14, 803 P.2d 202 (Ct. App. 1990); *Milton v. State*, 126 Idaho 638, 888 P.2d 812 (Ct. App. 1995); *State v. Garcia*, 126 Idaho 836, 892 P.2d 903 (Ct. App. 1995).

ANALYSIS

Evidence sufficient.

Harmless error.

Rape.

Sentence.

Sufficient information.

Evidence Sufficient.

Where defendant insisted 13-year-old girl go upstairs and show him where some towels were, followed her, blocked the hall, pushed her into the bedroom and, pointing to the bed, stated "Right here should be fine," the jury could have reasonably concluded that, by successfully getting away, the girl had escaped being a victim of rape or lewd conduct; thus, defendant was unable to demonstrate on appeal that there was insufficient evidence to support the jury's conviction for battery with the intent to commit a serious felony. *State v. Monroe*, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996).

Harmless Error.

Although testimony about defendant's drug addiction should not have been admitted to show motive to commit burglary and battery with the intent to commit robbery, the error was harmless. *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993).

Rape.

Battery with intent to commit rape is a lesser included offense of forcible rape. *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991).

Sentence.

A unified sentence of 15 years, with a 12-year minimum period of confinement for conviction of battery with the intent to commit a serious felony, namely rape, was not excessive

where defendant had an extensive criminal record for sex-related offenses and a psychologist's diagnosis attached to the presentence report indicated that the defendant's psychotic disorders of schizophrenia and "hypersexuality" required long-term inpatient rehabilitation and treatment in order to prevent further sexual misconduct. The sentencing court noted that its primary concern was for the protection of society and noted that proper medical treatment would be available during incarceration. *State v. Tillman*, 118 Idaho 617, 798 P.2d 462 (Ct. App. 1990).

Sentencing judge did not abuse his discretion where he sentenced a defendant convicted of two counts of first degree burglary and battery with intent to commit rape, to 25 years, with ten years indeterminate following a minimum period of confinement of 15 years on each of the three felony counts; ordinarily, each felony would carry a maximum penalty of not more than 15 years; however, because the jury found that the defendant was a persistent violator, the maximum permissible sentence for each of the felonies was extended to imprisonment for life. *State v. Haggard*, 119 Idaho 664, 809 P.2d 525 (Ct. App. 1991).

The court did not abuse its discretion in imposing a minimum of seven years with a unified sentence of fifteen years for first degree burglary, which was enhanced for the use of a deadly weapon to a fixed twelve-year sentence and an indeterminate sentence of twenty-five years and the same sentence for battery with intent to commit a serious felony, with the same enhancement, on a burglary charge where the presentence investigation report revealed felony convictions for two previous robberies and one battery on a peace officer along with a number of felony burglary and robbery charges that were reduced or the disposition was unknown. *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993).

Where district court found that defendant was a multiple offender with prior convictions of voluntary manslaughter and malicious wounding, that he lied in writing to the court regarding his prior offenses, and that he had the potential to inflict serious harm, defendant was unable to show on appeal that his sentence to a fixed term of 15 years for conviction for battery with intent to commit a serious felony was excessive under the facts. *State v. Monroe*, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996).

Sufficient Information.

Information alleged facts sufficient to state an offense and, therefore, was sufficient to

confer jurisdiction; the term "rape," even as used in the everyday language of non-lawyers, referred to sexual penetration, and defendant could not argue that the words "with the intent to commit the crime of rape" were

insufficient to allege the specific element of battery with intent to commit rape. *State v. Mayer*, — Idaho —, 84 P.3d 579 (Ct. App. 2004).

18-912. Battery with the intent to commit a serious felony — Punishment. — A battery with the intent to commit a serious felony is punishable by imprisonment in the state prison not to exceed fifteen (15) years. [I.C., § 18-912, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-912 was repealed, see Compiler's notes, § 18-901.

Cited in: *Volker v. State*, 107 Idaho 1059, 695 P.2d 809 (Ct. App. 1985); *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985); 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986); *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991).

Sentence Upheld.

Where the defendant's attack upon victim was an unprovoked, execution-style attempt to take a human life that only fortuitously was unsuccessful, and defendant denied that he had any mental disease or needed treatment, fixed life sentence for robbery and fixed 15-year sentence for battery, enhanced by an additional 15 years for use of a firearm, was justified to protect society. *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985).

Where the defendant, who had been released on parole only five months previously,

stabbed two store clerks who followed his wife from a store in an attempt to detain her for shoplifting, and the presentence report indicated that the defendant had a history of assaultive behavior, an indeterminate sentence not to exceed 15 years was not excessive. *State v. Pardo*, 109 Idaho 1036, 712 P.2d 737 (Ct. App. 1985).

Where defendant's criminal record spanned ten years, including his juvenile record, a sentence of five years with two years fixed for first degree burglary, to be served concurrently with an identical sentence previously imposed in a separate case, and a sentence of ten years with three years fixed for battery with the intent to commit rape, to be served consecutively to the sentence on the first degree burglary conviction were reasonable sentences under the circumstances. *State v. Acha*, 122 Idaho 744, 838 P.2d 873 (Ct. App. 1992).

18-913. Felonious administering of drugs defined. — Any person who administers, aids in administering or orders the administering to another any chloroform, ether, laudanum or other narcotic, anaesthetic or intoxicating agent, with intent to enable or assist himself or any other person to commit a felony, is guilty of felonious administering of drugs. [I.C., § 18-913, as added by 1979, ch. 227, § 2, p. 624.]

Compiler's notes. Former § 18-913 was repealed, see compiler's notes, § 18-901.

Sec. to sec. ref. This section is referred to in §§ 18-920 and 19-5307.

Collateral References. 6A C.J.S., Assault and Battery, § 81.

18-914. Felonious administering of drugs — Punishment. — A felonious administering of drugs is punishable by imprisonment in the state prison not to exceed five (5) years or five thousand (\$5,000) dollars, or both. [I.C., § 18-914, as added by 1979, ch. 227, § 2, p. 624.]

18-915. Assault or battery upon certain personnel — Punishment. — Any person who commits a crime provided for in this chapter against or upon a justice, judge, magistrate, prosecuting attorney, public defender, peace officer, bailiff, marshal, sheriff, police officer, correctional officer, employee of the department of correction, employee of a private prison contractor while employed at a private correctional facility in the

state of Idaho, employees of the department of water resources authorized to enforce the provisions of chapter 38, title 42, Idaho Code, jailer, parole officer, officer of the Idaho state police, fireman, social caseworkers or social work specialists of the department of health and welfare, employee of a state secure confinement facility for juveniles, employee of a juvenile detention facility, a teacher at a detention facility or a juvenile probation officer, emergency medical technician certified by the department of health and welfare, emergency medical technician-ambulance certified by the department of health and welfare, advanced emergency medical technician and EMT-paramedic certified by the state board of medicine, a member, employee or agent of the state tax commission, United States marshal, or federally commissioned law enforcement officer or their deputies or agents and the perpetrator knows or has reason to know of the victim's status, the punishment shall be as follows:

(a) For committing battery with intent to commit a serious felony the punishment shall be imprisonment in the state prison not to exceed twenty-five (25) years.

(b) For committing any other crime in this chapter the punishment shall be doubled that provided in the respective section, except as provided in subsections (c) and (d) of this section.

(c) For committing a violation of the provisions of section 18-901 or 18-903, Idaho Code, against the person of a justice, judge or magistrate, jailer or correctional officer or other staff of the department of correction, or a county jail, or of a private correctional facility, or of an employee of a state secure confinement facility for juveniles, an employee of a juvenile detention facility, a teacher at a detention facility or a juvenile probation officer and the person committing the offense knows or reasonably should know that such victim is a justice, judge or magistrate, jailer or correctional officer or other staff of the department of correction, or of a private correctional facility, an employee of a state secure confinement facility for juveniles, an employee of a juvenile detention facility, a teacher at a detention facility or a juvenile probation officer because of the victim's former or present official status, and the victim is engaged in the performance of his duties, the offense shall be a felony punishable by imprisonment in a correctional facility for a period of not more than five (5) years, and said sentence shall be served consecutively to any sentence being currently served.

(d) For committing a violation of the provisions of section 18-903, Idaho Code, except unlawful touching as described in section 18-903(b), Idaho Code, against the person of a peace officer, sheriff or police officer because of the victim's former or present official status, the offense shall be a felony punishable by imprisonment in a correctional facility for a period of not more than five (5) years, and said sentence shall be served consecutively to any sentence being currently served. [I.C., § 18-915, as added by 1979, ch. 227, § 2, p. 624; am. 1981, ch. 263, § 2, p. 559; am. 1992, ch. 221, § 1, p. 670; am. 1995, ch. 51, § 1, p. 118; am. 1999, ch. 247, § 1, p. 635; am. 2000, ch. 272, § 3, p. 786; am. 2000, ch. 297, § 3, p. 1025; am. 2000, ch. 469, § 21, p. 1450; am. 2001, ch. 181, § 1, p. 609.]

Compiler's notes. This section was amended by three 2000 acts — ch. 272, § 3, effective April 12, 2000, ch. 297, § 3 and ch. 469, § 21, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 272, § 3, near the middle of the introductory language, inserted “employee of a private prison contractor while employed at a private correctional facility in the state of Idaho” following “department of correction”; in subdivision (c), inserted “or of a private correctional facility” following “department of correction”, inserted “or other staff of the department of correction, or of a private correctional facility” following “correctional officer”, and substituted “a correctional facility” for “the state prison”.

The 2000 amendment by ch. 297, § 3, near the end of the introductory language, inserted “a member, employee or agent of the state tax commission,” following “state board of medicine”.

The 2000 amendment by ch. 469, § 21, near the middle of the introductory language, substituted “the Idaho state police” for “the state department of law enforcement”.

Section 2 of S.L. 2000, ch. 272 is compiled as § 18-101B.

Section 2 of S.L. 2000, ch. 297 is compiled as § 63-3077.

Sections 20 and 22 of S.L. 2000, ch. 469 are compiled as §§ 9-340C and 18-3302, respectively.

Section 1 of S.L. 1981, ch. 263 is compiled as § 18-911.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-920, 20-525A and 63-3076.

Cited in: *State v. Browning*, 107 Idaho 870, 693 P.2d 1072 (Ct. App. 1984); *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986); *State v. Rutter*, 112 Idaho 1142, 739 P.2d 441 (Ct. App. 1987); *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988); *State v. Marchant*, 115 Idaho 403, 766 P.2d 1284 (Ct. App. 1989); *State v. Barton*, 119 Idaho 114, 803 P.2d 1020 (Ct. App. 1991); *State v. Robison*, 119 Idaho 890, 811 P.2d 500 (Ct. App. 1991); *State v. Bowman*, 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993); *State v. Smoke*, 130 Idaho 263, 939 P.2d 582 (Ct. App. 1997); *State v. Watts*, 131 Idaho 782, 963 P.2d 1219 (Ct. App. 1998); *State v. Alsanea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003).

ANALYSIS

Evidence.

—Improper admission.

—Officer's testimony.

—Witness testimony.

Instructions.

Information and indictment.

Prosecutorial misconduct.
Sentence.

Evidence.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he “wanted to kill a cop” was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to “kill a cop” and it was irrelevant if offered for the nonhearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

In prosecution for aggravated assault on a law enforcement officer, the admission of the defendant's blood alcohol test result, even if error, was harmless, where testimony was adduced, without objection, that the defendant had been consuming alcoholic beverages and the test result simply confirmed that undisputed fact, and the evidence of intoxication actually could have been exculpatory under the instructions the trial court gave the jury on intent. *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

Evidence was sufficient to support defendant's conviction of aggravated battery and assault on a law officer in violation of §§ 18-901(b), 18-903, 18-905(a), 18-907, and 18-915, and there was no abuse of discretion in sentencing given defendant's criminal history; a jury could have reasonably concluded from the evidence that defendant intended to shoot the officers involved in the altercation, instead of attempting suicide as defendant contended, given the fact that defendant pointed the gun at them when he gained control over it. *State v. Hoffman*, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

—Improper Admission.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the improper admission of officers' testimony about a radio report where the dispatcher stated that the defendant had said he “wanted to kill a cop” was not harmless error because it may have made a significant contribution to the jury's ultimate determination of the specific intent issue. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

—Officer's Testimony.

The court did not err in its consideration of the testimony given by officers that the shooting of a fellow officer had a significant impact on the relatively close-knit community of the

district's state police force. *State v. Kerrigan*, 123 Idaho 508, 849 P.2d 969 (Ct. App. 1993).

—Witness Testimony.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the testimony of the preliminary hearing witness regarding the defendant's alleged statement in her presence was not hearsay but a party's statement under Rule I.R.E. 801(d)(2); however, on remand the trial court should make a ruling on the application of I.R.E. 403 to this testimony. *State v. Bohner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

Instructions.

Where, in a prosecution for obstructing a police officer and committing a battery upon a police officer, there was a question of fact whether the defendant had made a lunge at one officer, justifying the other in grabbing the defendant from behind, and there also was a related question whether the officers at any time used force to an excessive degree, the magistrate's refusal to instruct the jury on the right of a citizen to resist excessive force by police constituted reversible error entitling the defendant to a new trial. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

Information and Indictment.

Although the information did not set forth the official or customary citation of the statute related to the penalties for aggravated assault upon a police officer, it did set forth the facts necessary to advise defendant that he was charged with aggravated assault and that the alleged victim was a police officer; therefore, all the factual elements for a charge punishable under this section were set forth, and defendant did not show prejudice from the lack of the citation. *State v. Page*, 135 Idaho 214, 16 P.3d 890 (2000).

Where, in a prosecution for obstructing a police officer and battery upon a police officer, the alleged act of battery — the kick making contact with an officer — could be viewed either as a fortuitous event subsumed by the general struggle or as an event separated in

time and place from the rest of the altercation, the magistrate was directed on remand to instruct the jury that they could not convict of both offenses unless they were convinced beyond a reasonable doubt that both alleged crimes arose out of separate and distinct acts, each accompanied by criminal intent. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

Prosecutorial Misconduct.

In prosecution for aggravated assault on a law enforcement officer, the prosecutor's remark improperly predicting future confrontations between the defendant and the police was not fundamental error, requiring reversal of the judgment of conviction, where the defendant made no objection to the argument nor did he move for a mistrial or otherwise challenge the comment before the case was submitted to the jury, and the remark was not so egregious or inflammatory that any prejudice arising therefrom could not have been remedied by a ruling from the trial court. *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988).

Sentence.

A 15-year sentence with a ten-year minimum period of confinement for aggravated battery upon a correctional officer, to run consecutively to the indeterminate life sentence already being served by inmate, was not excessive in light of inmate's lengthy disciplinary record while in prison and in light of the fact that inmate acted deliberately without the slightest provocation. *State v. Matthews*, 118 Idaho 659, 798 P.2d 941 (Ct. App. 1990).

The district court sentence of a five-year term with two years fixed was not an abuse of discretion where the maximum sentence could have been 10 years, and the court found that the goal of rehabilitation was secondary to that of deterrence, and a person who would draw a weapon on a law enforcement officer under these circumstances should be considered a danger to the community. *State v. Daniels*, 134 Idaho 896, 11 P.3d 1114 (2000).

DECISIONS UNDER PRIOR LAW

Voluntariness of Guilty Plea.

Where a man, 64, was in prison on a seven-year sentence for armed robbery, and hit a guard with a metal bottle during an escape, and was charged with violations of both former law providing punishment for assault committed on a correctional officer and § 18-2505, and plead guilty to a violation of the former law, and was present with his attorney prior to actual imposition of sentence, at

which time his attorney asked that defendant's sentence not be made consecutive due to his advanced age and ill health, and the prosecutor said he was not requesting a consecutive sentence, the defendant would not be heard to assert that his guilty plea was involuntary because he was unaware of the possibility of a consecutive sentence. *State v. Flummer*, 99 Idaho 567, 585 P.2d 1278 (1978).

18-915A. Removing a firearm from a law enforcement officer. —

(1) A person may not knowingly remove or attempt to remove a firearm from the possession of another person if:

(a) The other person is lawfully acting within the course and scope of employment; and

(b) The person knows or has reason to know that the other person is employed as any of the following:

(i) A law enforcement officer who, in an official capacity, is authorized to make arrests; or

(ii) An employee of the Idaho board of correction, the Idaho department of juvenile corrections, any prison, jail, detention or booking facility or private correctional facility within the state, or the commission of pardons and parole.

(2) A person who violates this section is guilty of a felony.

(3) A sentence imposed for a violation of this section may be imposed separate from and consecutive to or concurrent with a sentence for any offense based on the act or acts establishing the offense under this section. [I.C., § 18-915A, as added by 1998, ch. 395, § 1, p. 1239; am. 2000, ch. 272, § 4, p. 786.]

Compiler's notes. Section 5 of S.L. 2000, ch. 272 is compiled as § 18-2502.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

18-915B. Propelling bodily fluid or waste at certain persons. —

Any person who is housed in a state, private or county correctional facility, work release center or labor camp, or who is being transported or supervised by a correctional officer or detention officer, irrespective of whether the person is a sentenced prisoner or a pretrial detainee, and who knowingly propels any bodily fluid or bodily waste at any detention officer, correctional officer, staff member, private contractor or employee of a county or state correctional facility, or authorized visitor to a county or state correctional facility, work release center or labor camp, or who knowingly introduces any bodily fluid or bodily waste into the food or drink of such officer, staff member, private contractor, employee or authorized visitor, shall be guilty of a felony punishable by imprisonment in a correctional facility for not more than five (5) years, and such sentence shall be served consecutively to any sentence currently served. [I.C., § 18-915B, as added by 2001, ch. 33, § 1, p.53.]

18-916. Abuse of school teachers. — Every parent, guardian or other person who upbraids, insults or abuses any teacher of the public schools, in the presence and hearing of a pupil thereof, is guilty of a misdemeanor. [I.C., § 18-916, as added by 1979, ch. 227, § 2, p. 624.]

Sec. to sec. ref. This section is referred to in § 33-1222.

Insulting words as criminal offense. 48 A.L.R. 95.

Collateral References. 6 Am. Jur. 2d, Assault and Battery, § 31.

18-917. Hazing. — (1) No student or member of a fraternity, sorority or other living or social student group or organization organized or operating on or near a school or college or university campus, shall intentionally haze or conspire to haze any member, potential member or person pledged to be a member of the group or organization, as a condition or precondition of attaining membership in the group or organization or of attaining any office or status therein.

(2) As used in this section, “haze” means to subject a person to bodily danger or physical harm or a likelihood of bodily danger or physical harm, or to require, encourage, authorize or permit that the person be subjected to any of the following:

- (a) Total or substantial nudity on the part of the person;
- (b) Compelled ingestion of any substance by the person;
- (c) Wearing or carrying of any obscene or physically burdensome article by the person;
- (d) Physical assaults upon or offensive physical contact with the person;
- (e) Participation by the person in boxing matches, excessive number of calisthenics, or other physical contests;
- (f) Transportation and abandonment of the person;
- (g) Confinement of the person to unreasonably small, unventilated, unsanitary or unlighted areas;
- (h) Sleep deprivation; or
- (i) Assignment of pranks to be performed by the person.

(3) The term “hazing,” as defined in this section, does not include customary athletic events or similar contests or competitions, and is limited to those actions taken and situations created in connection with initiation into or affiliation with any group or organization. The term “hazing” does not include corporal punishment administered by officials or employees of public schools when in accordance with policies adopted by local boards of education.

(4) A student or member of a fraternity, sorority or other student organization, who personally violates any provision of this section shall be guilty of a misdemeanor. [I.C., § 18-917, as added by 1991, ch. 338, § 1, p. 874; am. 2002, ch. 268, § 1, p. 798.]

18-918. Domestic violence. — (1) For the purpose of this section:

- (a) “Household member” means a person who is a spouse, former spouse, or a person who has a child in common regardless of whether they have been married or a person with whom a person is cohabiting, whether or not they have married or have held themselves out to be husband or wife.
- (b) “Traumatic injury” means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force.

(2)(a) Any household member who commits a battery, as defined in section 18-903, Idaho Code, and willfully and unlawfully inflicts a traumatic injury upon any other household member is guilty of a felony.

(b) A conviction of felony domestic battery is punishable by imprisonment in the state prison for a term not to exceed ten (10) years or by a fine not

to exceed ten thousand dollars (\$10,000) or by both fine and imprisonment.

(3)(a) A household member who commits an assault, as defined in section 18-901, Idaho Code, against another household member which does not result in traumatic injury is guilty of a misdemeanor domestic assault.

(b) A household member who commits a battery, as defined in section 18-903, Idaho Code, against another household member which does not result in traumatic injury is guilty of a misdemeanor domestic battery.

(c) A first conviction under this subsection (3) is punishable by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in a county jail not to exceed six (6) months, or both. Any person who pleads guilty to or is found guilty of a violation of this subsection (3) who previously has pled guilty to or been found guilty of a violation of this subsection (3), or of any substantially conforming foreign criminal violation, notwithstanding the form of the judgment or withheld judgment, within ten (10) years of the first conviction, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail for a term not to exceed one (1) year or by a fine not exceeding two thousand dollars (\$2,000) or by both fine and imprisonment. Any person who pleads guilty to or is found guilty of a violation of this subsection (3) who previously has pled guilty to or been found guilty of two (2) violations of this subsection (3), or of any substantially conforming foreign criminal violation or any combination thereof, notwithstanding the form of the judgment or withheld judgment, within fifteen (15) years of the first conviction, shall be guilty of a felony and shall be punished by imprisonment in the state prison for a term not to exceed five (5) years or by a fine not to exceed five thousand dollars (\$5,000) or by both fine and imprisonment.

(4) The maximum penalties provided in this section shall be doubled where the act of domestic assault or battery for which the person is convicted or pleads guilty took place in the presence of a child. For purposes of this section, "in the presence of a child" means in the physical presence of a child or knowing that a child is present and may see or hear an act of domestic assault or battery. For purposes of this section, "child" means a person under sixteen (16) years of age.

(5) Notwithstanding any other provisions of this section, any person who previously has pled guilty to or been found guilty of a felony violation of the provisions of this section or of any substantially conforming foreign criminal felony violation, notwithstanding the form of the judgment or withheld judgment, and who within fifteen (15) years pleads guilty to or is found guilty of any further violation of this section, shall be guilty of a felony and shall be punished by imprisonment in the state prison for a term not to exceed ten (10) years or by a fine not to exceed ten thousand dollars (\$10,000), or by both such fine and imprisonment.

(6) For the purposes of this section, a substantially conforming foreign criminal violation exists when a person has pled guilty to or been found guilty of a violation of any federal law or law of another state, or any valid county, city or town ordinance of another state, substantially conforming with the provisions of this section. The determination of whether a foreign

criminal violation is substantially conforming is a question of law to be determined by the court.

(7)(a) Any person who pleads guilty to or is found guilty of a violation of this section shall undergo, at the person's own expense, an evaluation by a person, agency or organization approved by the court in accordance with subsection [(7)](c) of this section to determine whether the defendant should be required to obtain aggression counseling or other appropriate treatment. Such evaluation shall be completed prior to the sentencing date if the court's list of approved evaluators, in accordance with subsection [(7)](c) of this section, contains evaluators who are able to perform the evaluation prior to the sentencing dates. If the evaluation recommends counseling or other treatment, the evaluation shall recommend the type of counseling or treatment considered appropriate for the defendant, together with the estimated costs thereof, and shall recommend any other suitable alternative counseling or treatment programs, together with the estimated costs thereof. The defendant shall request that a copy of the completed evaluation be forwarded to the court. The court shall take the evaluation into consideration in determining an appropriate sentence. If a copy of the completed evaluation has not been provided to the court, the court may proceed to sentence the defendant; however, in such event, it shall be presumed that counseling is required unless the defendant makes a showing by a preponderance of evidence that counseling is not required. If the defendant has not made a good faith effort to provide the completed copy of the evaluation to the court, the court may consider the failure of the defendant to provide the report as an aggravating circumstance in determining an appropriate sentence. If counseling or other treatment is ordered, in no event shall the person, agency or organization doing the evaluation be the person, agency or organization that provides the counseling or other treatment unless this requirement is waived by the sentencing court, with the exception of federally recognized Indian tribes or federal military installations, where diagnosis and treatment are appropriate and available. Nothing herein contained shall preclude the use of funds authorized for court-ordered counseling or treatment pursuant to this section for indigent defendants as provided by law. In the event that funding is provided for or on behalf of the defendant by a governmental entity, the defendant shall be ordered to make restitution to such governmental entity in accordance with the restitution procedure for crime victims, as specified under chapter 53, title 19, Idaho Code.

(b) If the evaluation recommends counseling or other treatment, the court shall order the person to complete the counseling or other treatment in addition to any other sentence which may be imposed. If the court determines that counseling or treatment would be inappropriate or undesirable, the court shall enter findings articulating the reasons for such determination on the record. The court shall order the defendant to complete the preferred counseling or treatment program set forth in the evaluation, or a comparable alternative, unless it appears that the defendant cannot reasonably obtain adequate financial resources for such counseling or treatment. In that event, the court may order the defendant

to complete a less costly alternative set forth in the evaluation or a comparable program. Nothing contained in this subsection shall be construed as requiring a court to order that counseling or treatment be provided at government expense unless otherwise required by law.

(c) Each judicial district shall by rule establish a uniform system for the qualification and approval of persons, agencies or organizations to perform the evaluations required in this subsection. Only qualified evaluators approved by the court shall be authorized to perform such evaluations. Funds to establish a system for approval of evaluators shall be derived from moneys designated therefor and deposited in the district court fund as provided in section 31-3201A(q), Idaho Code.

(d) Counseling or treatment ordered pursuant to this section shall be conducted according to standards established or approved by the Idaho council on domestic violence. [I.C., § 18-918, as added by 1993, ch. 344, § 1, p. 1283; am. 1995, ch. 223, § 1, p. 770; am. 1996, ch. 228, § 1, p. 742; am. 1998, ch. 309, § 1, p. 1026; am. 1998, ch. 420, § 1, p. 1323; am. 2000, ch. 358, § 1, p. 1193; am. 2003, ch. 237, § 1, p. 607; am. 2004, ch. 118, § 1, p. 392.]

Compiler's notes. This section was amended by two 1998 acts — S.L. 1998, ch. 309, § 1, effective July 1, 1998, and S.L. 1998, ch. 420, § 1, effective July 1, 1998, which do not conflict and have been compiled together.

The amendment by ch. 309, § 1, inserted the (a) designation in subsection (7) and added subsection (7)(b).

The amendment by ch. 420, § 1, substituted "violence" for "assault or battery" in the catchline of the section, substituted "a person with whom a person is cohabiting, whether or not they have married or have held themselves out to be husband or wife" for "have lived together at any time" at the end of subsection (1), added subsections (2) and (3), redesignated subsections (2) and (3) as subsections (4) and (5), inserted "which does not result in traumatic injury" and "a misdemeanor" in subsections (4) and (5), added subsection (6), redesignated subsection (4) as subsection (7), inserted "misdemeanor" near the beginning of subsection (7), redesignated subsection (5) as subsection (8), in the first sentence of subsection (8)(a) deleted "and prior to the sentencing date" following "own expense" and deleted "for anger control and prevention" following "other appropriate treatment", and added the second sentence in subsection (8)(a).

Section 2 of S.L. 1995, ch. 223 is compiled as § 31-3201A.

Section 2 of S.L. 1998, ch. 420 is compiled as § 31-3201A.

Section 2 of S.L. 2003, ch. 235, is compiled as § 18-8314.

Section 2 of S.L. 2000, ch. 358 declared an emergency. Approved April 14, 2000.

The bracketed insertions in subsection (7)

were made by the compiler.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-920, 19-603, 19-5506 and 31-3201A.

ANALYSIS

Arrest.

Constitutionality.

Household members.

Informing defendant of offense charged.

"Traumatic injury."

Arrest.

The fact that officers cited defendant for domestic battery, addressed under § 19-603(6), did not render the other subsections of the arrest statute facially inapplicable and did not require that his arrest must have been made at the scene of the domestic disturbance; objective assessment of the facts gave deputies reasonable cause for warrantless felony arrest under § 19-603(3). *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996).

Constitutionality.

Failure of the legislature to characterize the conduct condemned by this section as "unlawful" does not render this section vague, because the terms of the statute clearly render a violator subject to penal liability through the imposition of a fine and imprisonment. *State v. Larsen*, 135 Idaho 754, 24 P.3d 702 (2001).

Defendant was not denied equal protection of the laws because the provisions of paragraphs (3) and (5) do not define identical conduct resulting in different penalties. Conduct causing a traumatic injury differentiates a felony domestic battery from a misde-

meanor domestic battery. *State v. Larsen*, 135 Idaho 754, 24 P.3d 702 (2001).

This section is not unconstitutionally void for vagueness because the statute provides adequate notice of what behavior is prohibited and what the punishment for that behavior will be. *State v. Hellickson*, 135 Idaho 742, 24 P.3d 59 (2001); *State v. Prather*, 135 Idaho 770, 25 P.3d 83 (2001).

This section is not unconstitutionally overbroad because the statute provides adequate notice of what behavior is prohibited and what the punishment for that behavior will be. *State v. Davis*, 135 Idaho 747, 24 P.3d 64 (2001).

Defendant did not assert that the injuries he caused the victim were inflicted while engaged in a constitutionally protected activity, and when a statute can be applied to a person's conduct without violating any constitutional provision, he will not be heard to assert that the statute might be unconstitutional if applied to other types of behavior. *State v. Davis*, 135 Idaho 747, 24 P.3d 64 (2001).

This section, as amended, clearly establishes the prosecutor's burden of proving a "traumatic injury" for a felony conviction, and does not violate due process by shifting the burden of proof to the defense. *State v. Prather*, 135 Idaho 770, 25 P.3d 83 (2001).

This section does not obviously and invidiously discriminate and is, therefore, subject to rational basis review under the equal protection clause of Idaho's constitution. *State v. Hart*, 135 Idaho 827, 25 P.3d 850 (2001).

Subsection (3) of this section is not unconstitutional. *State v. Keaveny*, 136 Idaho 31, 28 P.3d 372 (2001).

The definition of "traumatic injury" in this section is sufficiently defined and, thus, not unconstitutionally vague. *State v. Keaveny*, 136 Idaho 31, 28 P.3d 372 (2001).

Statute gave defendant fair warning that his conduct was prohibited; defendant's contention that the statute was ambiguous as to whether it applied to persons who were co-

habiting in other circumstances was unavailing, for he had no standing to challenge the vagueness of the statute as it might be hypothetically applied to the conduct of others. *State v. Olson*, 138 Idaho 438, 64 P.3d 967 (Ct. App. 2003).

Household Members.

Statute, as it existed at the time of defendant's offense, included cohabitants who had never been married as a category of household members; defendant's battery of his live-in girlfriend was thus enjoined by the statute. *State v. Olson*, 138 Idaho 438, 64 P.3d 967 (Ct. App. 2003).

Informing Defendant of Offense Charged.

Section 19-608 requires that the person be informed of the cause of the arrest and not the charge for which he might eventually be made to answer; thus, although defendant's underlying arrest was validated under a different charge (aggravated battery) than that for which he was originally cited (misdemeanor domestic battery), defendant was informed of the cause of his arrest, the alleged battery committed on his wife, and such arrest was lawful. *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996).

"Traumatic Injury."

By prefacing the list in paragraph (2) that defines a traumatic injury with the words "such as," the legislature clearly meant the list to be non-exclusive, and where the district judge treated the list as exclusive, he impermissibly narrowed the application of the statute. *State v. Hart*, 135 Idaho 827, 25 P.3d 850 (2001).

Idaho Code § 18-918(3) requires that the state show that the defendant willfully and unlawfully inflicted a traumatic injury, not that the defendant intended to inflict the particular injury the victim actually suffered. *State v. Reyes*, — Idaho —, 80 P.3d 1103 (Ct. App. 2003).

18-919. Sexual exploitation by a medical care provider. — (a) Any person acting or holding himself out as a physician, surgeon, dentist, psychotherapist, chiropractor, nurse or other medical care provider as defined in this section, who engages in an act of sexual contact with a patient or client, is guilty of sexual exploitation by a medical care provider. For the purposes of this section, consent of the patient or client receiving medical care or treatment shall not be a defense. This section does not apply to sexual contact between a medical care provider and the provider's spouse, or a person in a domestic relationship who is also a patient or client. Violation of this section is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not to exceed one (1) year, or both.

(b) For the purposes of this section:

- (1) "Intimate part" means the sexual organ, anus, or groin of any person, and the breast of a female.
- (2) "Medical care provider" means a person who gains the trust and confidence of a patient or client for the examination and/or treatment of a medical or psychological condition, and thereby gains the ability to treat, examine and physically touch the patient or client.
- (3) "Sexual contact" means the touching of an intimate part of a patient or client for the purpose of sexual arousal, gratification, or abuse, and/or the touching of an intimate part of a patient or client outside the scope of a medical examination or treatment.
- (4) "Touching" means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. [I.C., § 18-919, as added by 1996, ch. 300, § 1, p. 988.]

Compiler's notes. Section 2 of S.L. 1996, ch. 300 is compiled as § 19-406.

Sec. to sec. ref. This section is referred to in § 19-406.

Ineffective Assistance of Counsel.

Although defendant's trial counsel admitted that his assistance did not fall within the range of competence regarding the wording of defendant's guilty plea to six counts of sexual exploitation by a medical care provider, defendant had not demonstrated that prejudice

resulted from counsel's failure to pluralize the word "charge" in the conditional plea agreement because defendant did not show that the elimination of the first three counts on appeal would have had such a dramatic effect on his defense of the remaining three counts that that strategy realistically would have been the basis for his decision to have pleaded guilty on the last three counts. *McKeeth v. State*, — Idaho —, 84 P.3d 575 (Ct. App. 2004).

18-920. Violation of no contact order. — (1) When a person is charged with or convicted of an offense under section 18-901, 18-903, 18-905, 18-907, 18-909, 18-911, 18-913, 18-915, 18-918, 18-919, 18-6710, 18-6711, 18-7905, 18-7906 or 39-6312, Idaho Code, or any other offense for which a court finds that a no contact order is appropriate, an order forbidding contact with another person may be issued. A no contact order may be imposed by the court or by Idaho criminal rule.

(2) A violation of a no contact order is committed when:

- (a) A person has been charged or convicted under any offense defined in subsection (1) of this section; and
- (b) A no contact order has been issued, either by a court or by an Idaho criminal rule; and
- (c) The person charged or convicted has had contact with the stated person in violation of an order.

(3) A violation of a no contact order is punishable by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in the county jail not to exceed one (1) year, or both. No bond shall be set for this violation until the person charged is brought before the court which will set bond. Further, any such violation may result in the increase, revocation or modification of the bond set in the underlying charge for which the no contact order was imposed.

(4) A peace officer may arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated a

no contact order issued under this section if the person restrained had notice of the order. [I.C., § 18-920, as added by 1997, ch. 314, § 1, p. 929; am. 1998, ch. 353, § 1, p. 1111; am. 2000, ch. 146, § 1, p. 374; am. 2000, ch. 239, § 1, p. 669; am. 2004, ch. 337, § 1, p. 1007.]

Compiler's notes. This section was amended by two 2000 acts — ch. 146, § 1, effective April 3, 2000 and ch. 239, § 1, effective April 12, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 146, § 1, in subsection (1), inserted "18-909" preceding "18-911".

The 2000 amendment by ch. 239, § 1, in subsection (1), inserted "or convicted of" preceding "an offense under"; in subdivision (2)(a), inserted "or convicted" preceding "under any offense", and in subdivision (2)(c),

inserted "or convicted" preceding "has had contact".

Section 2 of S.L. 2000, ch. 146 declared an emergency. Approved April 3, 2000.

Section 2 of S.L. 2000, ch. 239 declared an emergency. Approved April 12, 2000.

Section 2 of S.L. 2004, ch. 337 contained a repeal.

Sec. to sec. ref. This section is referred to in § 19-603.

Cited in: State v. Jeppesen, 138 Idaho 71, 57 P.3d 782 (2002).

18-921. Peace officers — Immunity. — No peace officer may be held criminally or civilly liable for actions or omissions in the performance of the duties of his office under this chapter, if the peace officer acts in good faith and without malice. [I.C., § 18-921, as added by 1997, ch. 314, § 2, p. 929.]

18-922. Order — Transmittal to law enforcement agency. — (1) A no contact order may be imposed either by order of the court or by an Idaho criminal rule, as a condition of bond.

(2)(a) Notice of a no contact order shall be forwarded by the clerk of the court, or by the arresting agency where the defendant is given notice of the bond condition under an Idaho court rule, on or before the next judicial day, to the appropriate law enforcement agency.

(b) Upon receipt of such notice, the law enforcement agency shall forthwith enter the order into the Idaho law enforcement telecommunications system available in this state used by law enforcement agencies to list outstanding warrants. Entry into the Idaho law enforcement telecommunications system constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any county in the state.

(3) Law enforcement agencies shall establish procedures reasonably adequate to assure that an officer approaching or actually at the scene of an incident may be informed of the existence of such no contact order.

(4) A no contact order shall remain in effect for the term set by the court or an Idaho criminal rule, or until terminated by the court. [I.C., § 18-922, as added by 1997, ch. 314, § 3, p. 929.]

Compiler's notes. Section 4 of S.L. 1997, ch. 314 is compiled as § 19-603.

Cited in: State v. Jeppesen, 138 Idaho 71, 57 P.3d 782 (2002).

CHAPTER 10

BARRATRY AND ATTORNEYS AT LAW

SECTION.

18-1001. Common barratry.

18-1002. Proof of common barratry.

18-1003. Purchase of evidence of debt.

SECTION.

18-1004. Attorney defending when partner prosecutes.

18-1005. Exception to preceding section.

18-1001. Common barratry. — Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six (6) months and by fine not exceeding \$500. [I.C., § 18-1001, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6521; C.S., § 8189; I.C.A., § 17-1012, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1001, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cited in: *Barnes v. Hinton*, 103 Idaho 619, 651 P.2d 553 (Ct. App. 1982).

Collateral References. 14 Am. Jur. 2d, Champerty and Maintenance, §§ 16-18.

14 C.J.S., Champerty and Maintenance, § 1 et seq.

Purchase of cause of action by attorney as champertous. 4 A.L.R. 173.

Evidence, validity of employment to obtain. 16 A.L.R. 1433.

Quantum meruit or implied contract, right of attorney to recover upon, for services rendered under champertous contract. 85 A.L.R. 1365.

Attorney and layman, validity of agreement between, to divide attorney's fees or compensation for business of third person. 86 A.L.R. 195.

Solicitation, right of attorney to recover for services performed under contract procured by. 86 A.L.R. 517.

Government or agencies of government, law as to champerty or maintenance or maintenance as applied to agreement with respect to bringing and prosecution of claims against. 106 A.L.R. 1494.

Contract by one person to defend litigation that has been or may be instituted against another as champertous or maintainous. 121 A.L.R. 847.

Barratry; criminal aspects of champerty and maintenance. 139 A.L.R. 620.

Validity of agreement by attorney to save client harmless from costs and expenses. 8 A.L.R.3d 1155.

18-1002. Proof of common barratry. — No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three (3) instances, and with a corrupt or malicious intent to vex and annoy. [I.C., § 18-1002, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6522; C.S., § 8190; I.C.A., § 17-1013, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1002, as added by 1971, ch. 143, § 1. However, the latter section was

repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cited in: *Barnes v. Hinton*, 103 Idaho 619, 651 P.2d 553 (Ct. App. 1982).

18-1003. Purchase of evidence of debt. — Every attorney, public officer, or licensed collector, who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor. [I.C., § 18-1003, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6524; C.S., § 8192; am. 1927, ch. 52, § 1, p. 67; I.C.A., § 17-1015, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1003, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: *Bryan v. Montandon*, 6 Idaho 352, 55 P. 650 (1898); *Interstate Credit League v. Widdison*, 50 Idaho 493, 297 P. 1106 (1931).

ANALYSIS

Attorneys.

Champerty and maintenance.

Collection agencies.

Public policy.

Attorneys.

An attorney has a right to purchase a tax title from the county and to bring an action to quiet his title thereto, without violating this section. *Griffith v. Anderson*, 22 Idaho 323, 125 P. 218 (1912).

The common law rule of champerty and maintenance not being in force in this state, under § 3-205 the measure and mode of attorneys' fees are left to agreement, expressed or implied between attorney and client, and will be enforceable unless contrary to good morals or sound public policy. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

An attorney is prohibited from buying, either directly or indirectly, any evidence of debt or thing in action, with intent of suing thereon. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

Champerty and Maintenance.

Champerty at common law consisted in supporting or maintaining a suit for another on agreement to have a part of the thing or some benefit or an agreement to divide the receipts from the action. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

The common law doctrine of champerty and maintenance is not in force in Idaho. It was repudiated by the Supreme Court of California as being incompatible with our institutions and form of government, the subject being governed by the statute alone. The Idaho statute was adopted from California and the decisions of the California courts are also presumed to have been adopted. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

An assignment of a claim for collection with the agreement that the assignor is to receive one-half of the amount collected, together with any expenses advanced by the assignor, is not contrary to good morals or sound public policy. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

Collection Agencies.

Collection agency is not prohibited from buying part interest in claim to compensate itself for collecting same, even though suit is instituted. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

The taking of an interest in an obligation for the purpose of collecting the same does not constitute a violation of this section. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912); *Interstate Credit League v. Widdison*, 50 Idaho 493, 297 P. 1106 (1931).

Former Chapter 22, title 26 of the Idaho Code (and the previous enactment of S.L. 1915, ch. 76, p. 187), by authorizing collection of debts by licensed collection agencies, recognized that lawful means for accomplishment thereof may be employed, which impliedly includes the right to invoke legal processes afforded by court procedures notwithstanding the provisions of the former section prohibiting attorneys, public officers or licensed collectors becoming interested in a debt with intent to sue thereon; consequently, this did not support respondent's argument that appellant could not have owned the debt as a true assignee. *Garren v. Saccomanno*, 86 Idaho 268, 385 P.2d 396 (1963).

Public Policy.

Although the doctrine of champerty and maintenance does not prevail in this state, the courts will refuse to grant relief or enforce contracts where they are contrary to good morals or sound public policy. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

Collateral References. 14 Am. Jur. 2d, Champerty and Maintenance, § 8.

14 C.J.S., Champerty and Maintenance, § 8.

Purchase in good faith before institution of action. 4 A.L.R. 167.

Purchase of cause of action by attorney as champertous. 4 A.L.R. 173.

Evidence, validity of employment to obtain. 16 A.L.R. 1433.

Quantum meruit or implied contract, right of attorney to recover upon, for services rendered under champertous contract. 85 A.L.R. 1365.

Attorney and layman, validity of agreement between, to divide attorney's fees or compensation for business of third person. 86 A.L.R. 195.

Solicitation, right of attorney to recover for services performed under contract procured by. 86 A.L.R. 517.

Government or agencies of government, law as to champerty or maintenance or maintenance as applied to agreement with respect to bringing and prosecution of claims against. 106 A.L.R. 1494.

Contract by one person to defend litigation that has been or may be instituted against another as champertous or maintenance. 121 A.L.R. 847.

Validity of agreement by attorney to save client harmless from costs and expenses. 8 A.L.R.3d 1155.

18-1004. Attorney defending when partner prosecutes. — Every attorney who directly or indirectly advises in relation to, or aids, or promotes the defense of, any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by any person as prosecuting attorney, or other public prosecutor, with whom such person is directly or indirectly connected as a partner, or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as prosecuting attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from, or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor, forfeits his license to practice law. [I.C., § 18-1004, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6525; C.S., § 8193; I.C.A., § 17-1016, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-1005. Exception to preceding section. — The preceding section does not prohibit an attorney from defending himself in person as attorney or counsel, when prosecuted either civilly or criminally. [I.C., § 18-1005, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6526; C.S., § 8194; I.C.A., § 17-1017, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

CHAPTER 11

BIGAMY AND POLYGAMY

SECTION.

18-1101. Bigamy defined.

18-1102. Exceptions to preceding section.

18-1103. Punishment for bigamy.

SECTION.

18-1104. Marrying spouse of another.

18-1105. [Repealed.]

18-1101. Bigamy defined. — Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy. [I.C., § 18-1101, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 6805; I.C.A., § 17-1802, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1101, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 3.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Evidence.

Validity of a ceremonial marriage will be presumed in absence of evidence tending to show that it was not regular and in accordance with law. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Testimony of justice of the peace of another state that he performed a marriage ceremony is a prima facie showing of his authority to perform it. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Evidence that alleged first wife went under defendant's name is competent, along with other evidence, to establish identity. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Collateral References. 10 Am. Jur. 2d, Bigamy, §§ 1—5.

52 Am. Jur. 2d, Marriage, §§ 68—69.

10 C.J.S., Bigamy, § 2.

Single person who marries one already

married, criminal responsibility of. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1323.

Religious belief as affecting crime of bigamy. 24 A.L.R. 1237.

Aiding and abetting, reduction by appellate court of punishment for. 29 A.L.R. 331; 89 A.L.R. 295.

Dissolution of former marriage, presumption as to, in prosecution for bigamy. 34 A.L.R. 482; 77 A.L.R. 729.

Presumption and burden in prosecution for bigamy as to dissolution of first marriage. 56 A.L.R. 1273.

Privileged communications and letters between husband and wife in prosecution for bigamy. 63 A.L.R. 107.

Common-law marriage, prosecution based on. 70 A.L.R. 1036.

Decree of annulment of marriage, admissibility in prosecution for bigamy and polygamy. 87 A.L.R. 1264.

Validation of marriage by death of former spouse. 95 A.L.R. 1292.

Presumption from lapse of time of death of former spouse, marriage in reliance on, while former spouse is still living and undivorced, as sustaining prosecution for bigamy. 144 A.L.R. 747.

Mistake as to validity or effect of divorce as defense to. 56 A.L.R.2d 915.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution modern state cases. 74 A.L.R.4th 223.

18-1102. Exceptions to preceding section. — The last section does not extend:

1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five (5) successive years without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court. [I.C., § 18-1102, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 6806; I.C.A., § 17-1803, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1102, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Collateral References. 52 Am. Jur. 2d, Marriage, §§ 68—69.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution modern state cases. 74 A.L.R.4th 223.

18-1103. Punishment for bigamy. — Bigamy is punishable by fine not exceeding \$2,000 and by imprisonment in the state prison not exceeding three (3) years. [I.C., § 18-1103, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 6807; I.C.A., § 17-1804, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1103, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Punishment.

Where trial court imposed on defendant, convicted of bigamy, a punishment prescribed by former law, which provided for punishment of polygamy, correction of error by Supreme Court did not prejudice defendant's rights. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Collateral References. 10 Am. Jur. 2d, Bigamy, § 63.

10 C.J.S., Bigamy, §§ 9-20.

18-1104. Marrying spouse of another. — Every person who knowingly and wilfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than \$2,000, or by imprisonment in the state prison not exceeding three (3) years. [I.C., § 18-1104, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 128; R.S., R.C., & C.L., § 6808; C.S., § 8285; I.C.A., § 17-1805, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

ANALYSIS

Application.

Elements of offense.

Proof of marriage.

Application.

Application of this section is to the offense of bigamy, defined in § 18-1101, and it is doubtful if it applies to the polygamy, defined in § 18-1105 (now repealed). *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Elements of Offense.

Under this section, marriage with husband or wife of another must be knowingly and

wilfully entered into before act of marriage constitutes crime. *State v. Sayko*, 37 Idaho 430, 216 P. 1036 (1923).

Proof of Marriage.

Proof of marriage may be at least prima facie shown by proof of fact that man or woman lives together with person of opposite sex as his or her spouse, with general recognition in community of their being married to each other; by proof of general repute in family; or by proof of general repute in community. *State v. Poulos*, 36 Idaho 453, 212 P. 120 (1922); *State v. Sayko*, 37 Idaho 430, 216 P. 1036 (1923).

Collateral References. 52 Am. Jur. 2d, Marriage, §§ 68—69.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution modern state cases. 74 A.L.R.4th 223.

18-1105. Polygamy — Definition and punishment. [Repealed.]

Compiler's notes. Former § 18-1105, which comprised I.C., § 18-1105, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 131, § 7, effective July 1, 1994.

Another former § 18-1105, which com-

prised 1905, p. 293, § 1; reen. R.C. & C.L., § 6806; C.S., § 8283; I.C.A., § 17-1801, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

CHAPTER 12

BILLIARD, POOL AND CARD ROOMS AND CONFECTIONARIES

SECTION.

18-1201 — 18-1203. [Repealed.]

18-1201. Pool and billiard halls — Sunday rest and midnight closing. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-1201, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1978, ch. 96, § 1.

A former section on the same subject, which comprised S.L. 1915, ch. 119, §§ 1, 2, p. 264; reen. C.L., § 6829; C.S., § 8297; I.C.A., § 17-

2601; am. 1965, ch. 24, § 1, p. 37 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1201, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-1202. Use of screens on pool and card rooms and confectionaries. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-1202, as added by 1972, ch. 336, § 1, p. 844, effective April 1, 1972 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

A former section on the same subject, which comprised S.L. 1911, ch. 94; compiled and reen. C.L., § 6829a; C.S., § 8298; I.C.A., § 17-2602, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-1203. Minors — Loitering about pool halls prohibited. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-1203, as added by 1972, ch. 336, § 1, p. 844, effective April 1, 1972, was repealed by S.L. 1972, ch. 381, § 9, effective April 1, 1972.

A former section on the same subject, which

comprised S.L. 1913, ch. 123, § 1, p. 469; reen. C.L., § 6329b; C.S., § 8299; I.C.A., § 17-2603; am. 1965, ch. 24, § 2, p. 37, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

CHAPTER 13

BRIBERY AND CORRUPTION

SECTION.

- 18-1301. Bribery of judicial officers.
- 18-1302. Receipt of bribe by officer.
- 18-1303. Acceptance of rewards.
- 18-1304. Attempt to influence jurors and arbitrators.
- 18-1305. Misconduct of jurors and arbitrators.
- 18-1306. [Repealed.]
- 18-1307. Forfeiture of office on conviction.
- 18-1308. Offenses relating to bribery — Incriminating testimony may be required.
- 18-1309. Bribery of municipal or county officers — Penalties.
- 18-1310, 18-1311. [Repealed.]
- 18-1351. Bribery and corrupt practices — Definitions.
- 18-1352. Bribery in official and political matters.
- 18-1353. Threats and other improper influence in official and political matters.
- 18-1353A. Threats against state officials of

SECTION.

- the executive, legislative or judicial branch or elected officials of a county or city.
- 18-1354. Compensation for past official behavior.
- 18-1355. Retaliation for past official action.
- 18-1356. Gifts to public servants by persons subject to their jurisdiction.
- 18-1357. Compensating public servant for assisting private interests in relation to matters before him.
- 18-1358. Selling political indorsement — Special influence.
- 18-1359. Using public position for personal gain.
- 18-1360. Penalties.
- 18-1361. Self-interested contracts — Exception.
- 18-1361A. Noncompensated appointed public servant — Relatives of public servant — Exception.
- 18-1362. Cause of action.

Compiler's notes. In 1972, Chapter 13, Bribery and Corruption, §§ 18-1301 — 18-1309 were enacted by S.L. 1972, ch. 336, § 1. Also in 1972, §§ 18-1351 — 18-1358 were added by S.L. 1972, ch. 381, § 20 which amended S.L. 1972, ch. 336 "by the addition thereto of a new chapter * * *". These sections (§§ 18-1351 — 18-1358) were added in a new chapter, Chapter 13A, which was given the heading "Bribery and Corrupt Influence" since the catchline of § 18-1351 read "Bribery and Corrupt Influence — Definitions".

S.L. 1982, ch. 263, § 1 amended Chapter 13 by the addition thereto of a new section, § 18-1353A.

S.L. 1990, ch. 328, § 2 amended Chapter 13A by the addition thereto of §§ 18-1359 — 18-1362.

S.L. 1992, ch. 121, § 1 amended Chapter 13 by the addition thereto of § 18-1361A.

As a result of these amendments, Chapter 13 consisted of §§ 18-1301 — 18-1309, 18-1353A and 18-1361A and Chapter 13A consisted of §§ 18-1351 — 18-1362. In order to clarify this situation these sections have been placed in numerical order in Chapter 13, Bribery and Corruption, so that this chapter now consists of §§ 18-1301 — 18-1309 and 18-1351 — 18-1362.

18-1301. Bribery of judicial officers. — Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator or umpire, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion or decision upon any matter or question which is or may be brought before him for decision, is guilty of a felony. [I.C., § 18-1301, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 92; R.S., R.C., & C.L., § 6430; C.S., § 8138; I.C.A., § 17-701, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1301, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. "Bribe" defined, § 18-101.

Bribery of electors, § 18-2320.

Bribery of executive officers and others, § 18-2701 and notes.

Penalty for felony when not otherwise provided, § 18-112.

Multiple Offenses.

The fact that an officer or giver of a bribe may be prosecuted under any one of a number of sections does not militate against a prosecution under this section. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Collateral References. 26 Am. Jur. 2d, Embracery, §§ 1-4.

11 C.J.S., Bribery, § 9.

29A C.J.S., Embracery, §§ 1-5.

Co-conspirator, liability of one cooperating in bribery which he was incapable of committing personally. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1322.

Charge of bribery or cognate offense predicated upon an unaccepted offer by or to an official. 52 A.L.R. 816.

Contempt by bribery, or attempting to bribe jurors. 63 A.L.R. 1274.

Candidate, statement by, regarding salary or fees of office as bribery. 106 A.L.R. 493.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be officer. 115 A.L.R. 1263.

Nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him, as defense to prosecution for bribery or acceptance of bribe. 158 A.L.R. 323.

New trial, statements by witness after criminal trial tending to show that his testimony was the result of perjury, as ground for. 158 A.L.R. 1071.

Criminal offense of bribery as affected by lack of authority of state public officer or employee. 73 A.L.R.3d 374.

18-1302. Receipt of bribe by officer. — Every judicial officer, juror, referee, arbitrator or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives or agrees to

receive any bribe, upon any agreement or understanding that his vote, opinion or decision upon any matters or question which is or may be brought before him for decision, shall be influenced thereby, is guilty of a felony. [I.C., § 18-1302, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 92; R.S., R.C., & C.L., § 6431; C.S., § 8139; I.C.A., § 17-702, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1302, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L.

1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Collateral References. 11 C.J.S., Bribery, § 11.

18-1303. Acceptance of rewards. — Every judicial officer who asks or receives any emolument, gratuity or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. [I.C., § 18-1303, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 113; R.S., R.C., & C.L., § 6432; C.S., § 8140; I.C.A., § 17-703, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1303, as added by 1971, ch. 143, § 1. How-

ever, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-1304. Attempt to influence jurors and arbitrators. — Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed a referee, in respect to his verdict in, or decision of, any cause pending, or about to be brought before him, either:

1. By means of any communication, oral or written, had with him, except in the regular course or proceedings;
2. By means of any book, paper or instrument exhibited, otherwise than in the regular course of proceedings;
3. By means of any threat, intimidation, persuasion or entreaty; or,
4. By means of any promise or assurance of any pecuniary or other advantage; is guilty of a felony. [I.C., § 18-1304, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 112; R.S., R.C., & C.L., § 6433; C.S., § 8141; I.C.A., § 17-704, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1304, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L.

1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Collateral References. 75 Am. Jur. 2d, Trial, § 1055.

18-1305. Misconduct of jurors and arbitrators. — Every juror or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who either:

1. Makes any promise or agreement to give a verdict or decision for or against any party; or,

2. Wilfully and corruptly permits any communication to be made to him, or receive any book, paper, instrument or information relating to any cause or matter pending before him, except according to the regular course of proceedings, is guilty of a felony. [I.C., § 18-1305, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 112; R.S., R.C., & C.L., § 6434; C.S., § 8142; I.C.A., § 17-1705, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1305, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and

the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Collateral References. 75 Am. Jur. 2d, Trial, §§ 993 — 998.

89 C.J.S., Trial, §§ 779—781.

18-1306. Theft of property lost, mislaid, or delivered by mistake. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-1306, as added by 1971, ch. 143, § 1, p. 630, effective January 1, 1972

and relating to theft of mislaid or lost property, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-1307. Forfeiture of office on conviction. — Every officer convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office. [I.C., § 18-1307, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6436; C.S., § 8144; I.C.A., § 17-707, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1307, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective

April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Collateral References. At common law, it was embracery for one to attempt to influence a grand juror. 112 A.L.R. 319.

18-1308. Offenses relating to bribery — Incriminating testimony may be required. — No person shall be excused from testifying or producing documents, at the instance of the state, in any criminal cause or proceeding touching any offense relating to bribery, on the ground that the testimony required of him may incriminate him. But no person shall be prosecuted or punished on account of any transaction, manner or thing concerning which he may be so required to testify or produce evidence: provided, that no person so testifying shall be exempt from prosecution and punishment for perjury in so testifying. [I.C., § 18-1308, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1905, p. 416, § 1; reen. R.C. & C.L., § 6437; C.S., § 8145; I.C.A., § 17-708, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted

therefor was a section comprising I.C., § 18-1308, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

18-1309. Bribery of municipal or county officers — Penalties. —

Every person who gives or offers a bribe to any member of any common council, board of county commissioners or board of trustees of any county, city or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before a body of which he is a member and every member of either of the bodies mentioned in this section who receives or offers to receive any such bribe and every person who gives or offers a bribe to any sheriff, deputy sheriff, policeman, constable, prosecuting attorney, or other officer charged with the enforcement of the laws of this state to receive or secure immunity from arrest, prosecution or punishment for a violation or contemplated violation of the laws of this state or any such officer who receives or offers to receive any such bribe is punishable by imprisonment in the state prison for a term not less than one (1) nor more than fourteen (14) years. [I.C., § 18-1309, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 93; R.S., R.C., & C.L., § 6528; am. 1919, ch. 148, p. 443; C.S., § 8196; I.C.A., § 17-1019, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1309, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. "Bribe" defined, § 18-101.

ANALYSIS

Policemen.

Prosecuting attorney.

Policemen.

Police officer accepting bribe for protecting woman illegally operating a hotel in violation of § 18-5612 (repealed) could be indicted under this section or § 18-2702. There is no conflict between these two sections. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

It is immaterial whether a police officer is prosecuted under this section or some other

section, since a prosecution under any section, relating to receiving bribes, would be a bar to prosecution under any other section. *Emory v. State*, 55 Idaho 649, 46 P.2d 67 (1935).

Prosecuting Attorney.

Addition of this section gives weight to conclusion that prosecuting attorney is not executive officer of state, whose bribery is provided for under § 18-2701. *State v. Wharfield*, 41 Idaho 14, 236 P. 862 (1925).

Collateral References. 12 Am. Jur. 2d, Bribery, §§ 12 — 14.

11 C.J.S., Bribery, § 9.

Bribery of a de facto officer. 115 A.L.R. 1265.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery. 67 A.L.R.3d 1231.

Criminal offense of bribery as affected by lack of authority of state public officer or employee. 73 A.L.R.3d 374.

Who is public official within meaning of federal statute punishing bribery of public official (18 U.S.C.A. § 201). 161 A.L.R. Fed. 491.

18-1310, 18-1311. Unauthorized use of automobiles and other vehicles — Wilful concealment of goods, wares or merchandise. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-1310, 18-1311, as added by 1971, ch. 143, § 1, p. 630, effective Janu-

ary 1, 1972 were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-1351. Bribery and corrupt practices — Definitions. — Unless a different meaning plainly is required in this chapter:

(1) “Benefit” means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

(2) “Confidential information” means knowledge gained through a public office, official duty or employment by a governmental entity which is not subject to disclosure to the general public and which, if utilized in financial transactions would provide the user with an advantage over those not having such information or result in harm to the governmental entity from which it was obtained.

(3) “Government” includes any branch, subdivision or agency of the government of the state or any locality within it and other political subdivisions including, but not limited to, highway districts, planning and zoning commissions and cemetery districts, and all other governmental districts, commissions or governmental bodies not specifically mentioned in this chapter.

(4) “Harm” means loss, disadvantage or injury, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.

(5) “Official proceeding” means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding.

(6) “Party official” means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility.

(7) “Pecuniary benefit” is any benefit to a public official or member of his household in the form of money, property or commercial interests, the primary significance of which is economic gain.

(8) “Public servant” means any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses.

(9) “Administrative proceeding” means any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals. [1972, ch. 381, § 20, p. 1102; am. 1990, ch. 328, § 1, p. 899.]

Compiler’s notes. The words “this chapter” as used in this section refer to the code chapter enacted by S.L. 1972, ch. 381, § 20, compiled as §§ 18-1351 — 18-1358.

Section 19 of S.L. 1972, ch. 381 was repealed.

Section 18 of S.L. 1972, ch. 381 is compiled as § 18-7401.

Section 2 of S.L. 1990, ch. 328 is compiled as §§ 18-1359 — 18-1362.

Sec. to sec. ref. This section is referred to in § 33-5204.

Private Right of Action.

A private right of action for insurance company's alleged obstruction of justice and violations of the Idaho Bribery and Corrupt Influences Act was not available and district court's dismissal of these claims was proper. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

Collateral References. Who is public official within meaning of federal statute punishing bribery of public official (18 U.S.C.A. § 201). 161 A.L.R. Fed. 491.

Defenses to state obstruction of justice charge relating to interfering with criminal investigation or judicial proceeding. 87 A.L.R.5th 597.

18-1352. Bribery in official and political matters. — A person is guilty of bribery, a felony, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) Any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(2) Any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(3) Any benefit as consideration for a violation of a known legal duty as public servant or party official.

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason. [1972, ch. 381, § 20, p. 1102.]

Sec. to sec. ref. This section is referred to in § 18-7803 and 33-5204.

18-1353. Threats and other improper influence in official and political matters. — (1) Offenses defined. A person commits an offense if he:

(a) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding; or

(c) threatens harm to any public servant or party official with purpose to influence him to violate his known legal duty; or

(d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with purpose to influence the outcome on the basis of considerations other than those authorized by law.

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) Grading. An offense under this section is a misdemeanor unless the actor threatened to commit a crime or made a threat with purpose to

influence a judicial or administrative proceeding, in which cases the offense is a felony. [1972, ch. 381, § 20, p. 1102.]

Sec. to sec. ref. This section is referred to in §§ 18-7803, 33-5204 and 63-3076.

Cited in: *Lamprecht v. Jordan, LLC*, — Idaho —, 75 P.3d 743 (2003).

18-1353A. Threats against state officials of the executive, legislative or judicial branch or elected officials of a county or city. —

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier, any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon any state elected official of the executive or legislative branch, or any justice, judge or magistrate of the judicial branch, or person appointed to fill the vacancy of a state elected official of the executive or legislative branch of the state of Idaho, or knowingly and willfully otherwise makes any such threat against a state elected official of the executive or legislative branch, or any justice, judge or magistrate of the judicial branch, or person appointed to fill the vacancy of a state elected official of the executive or legislative branch of the state of Idaho, or upon any elected official of any county or city, is guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed one thousand dollars (\$1,000) and shall be sentenced to not to exceed one (1) year in the county jail. If such threat is made while the defendant exhibits a firearm or other dangerous or deadly weapon, the defendant shall be guilty of a felony. Upon a second or subsequent conviction of an offense under this section, the defendant shall be guilty of a felony and shall be sentenced to a term of not to exceed five (5) years in the state penitentiary. [I.C., § 18-1353A, as added by 1982, ch. 263, § 1, p. 674; am. 1992, ch. 113, § 1, p. 342; am. 1996, ch. 401, § 1, p. 1334; am. 2000, ch. 131, § 1, p. 308.]

Compiler's notes. Section 2 of S.L. 1982, ch. 263 declared an emergency. Approved March 31, 1982.

Section 2 of S.L. 1992, ch. 113 declared an emergency. Approved April 1, 1992.

Cross ref. Use of telephone to threaten or harass, §§ 18-6710, 18-6711.

Sec. to sec. ref. This section is referred to in §§ 18-310, 33-5204 and 63-3076.

18-1354. Compensation for past official behavior. — A person commits a misdemeanor if he solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in his favor, or for having violated his duty. A person commits a misdemeanor if he offers, confers or agrees to confer, compensation, acceptance of which is prohibited by this section. [1972, ch. 381, § 20, p. 1102.]

Sec. to sec. ref. This section is referred to in § 33-5204 and 63-3076.

18-1355. Retaliation for past official action. — A person commits a misdemeanor if he harms another by any unlawful acts in retaliation for

anything lawfully done by the latter in the capacity of public servant. [1972, ch. 381, § 20, p. 1102.]

Sec. to sec. ref. This section is referred to in § 33-5204 and 63-3076.

18-1356. Gifts to public servants by persons subject to their jurisdiction. — (1) Regulatory and law enforcement officials. No public servant in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) Officials concerned with government contracts and pecuniary transactions. No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) Judicial and administrative officials. No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority, or participating in the enforcement of its decisions, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or a tribunal with which he is associated.

(4) Legislative officials. No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit in return for action on a bill, legislation, proceeding or official transaction from any person known to be interested in a bill, legislation, official transaction or proceeding, pending or contemplated before the legislature or any committee or agency thereof.

(5) Exceptions. This section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or

(b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or

(c) trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(6) Offering benefits prohibited. No person shall knowingly confer, or offer or agree to confer, any benefit prohibited by the foregoing subsections.

(7) Grade of offense. An offense under this section is a misdemeanor and shall be punished as provided in this chapter. [1972, ch. 381, § 20, p. 1102; am. 1990, ch. 328, § 3, p. 899.]

Compiler's notes. Sections 2 and 4 of S.L. 1990, ch. 328 are compiled as §§ 18-1359 — 18-1362 and 59-208, respectively. **Sec. to sec. ref.** This section is referred to in § 18-1359 and 33-5204.

18-1357. Compensating public servant for assisting private interests in relation to matters before him. — (1) Receiving compensation. A public servant commits a misdemeanor if he solicits, accepts or agrees to accept compensation for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise.

(2) Paying compensation. A person commits a misdemeanor if he pays or offers or agrees to pay compensation to a public servant with knowledge that acceptance by the public servant is unlawful. [1972, ch. 381, § 20, p. 1102.]

Sec. to sec. ref. This section is referred to in § 33-5204.

18-1358. Selling political indorsement — Special influence. — (1) Selling political indorsement. A person commits a misdemeanor if he solicits, receives, agrees to receive, or agrees that any political party or other person shall receive any pecuniary benefit as consideration for approval or disapproval of an appointment or advancement in public service, or for approval or disapproval of any person or transaction for any benefit conferred by an official or agency of the government. "Approval" includes recommendations, failure to disapprove, or any other manifestation of favor or acquiescence. "Disapproval" includes failure to approve, or any other manifestation of disfavor or nonacquiescence.

(2) Other trading in special influence. A person commits a misdemeanor if he solicits, receives or agrees to receive any pecuniary benefit as consideration for exerting special influence upon a public servant or procuring another to do so. "Special influence" means power to influence through kinship, friendship, or other relationship apart from the merits of the transaction.

(3) Paying for indorsement or special influence. A person commits a misdemeanor if he offers, confers or agrees to confer any pecuniary benefit, receipt of which is prohibited by this section. [1972, ch. 381, § 20, p. 1102.]

Compiler's notes. Section 21 of S.L. 1972, ch. 381, provided the act should take effect from and after April 1, 1972. **Sec. to sec. ref.** This section is referred to in § 33-5204.

18-1359. Using public position for personal gain. — (1) No public servant shall:

(a) Without the specific authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself.

(b) Solicit, accept or receive a pecuniary benefit as payment for services, advice, assistance or conduct customarily exercised in the course of his official duties. This prohibition shall not include trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional

or business contacts and involving no substantial risk of undermining official impartiality.

(c) Use or disclose confidential information gained in the course of or by reason of his official position or activities in any manner with the intent to obtain a pecuniary benefit for himself or any other person or entity in whose welfare he is interested or with the intent to harm the governmental entity for which he serves.

(d) Be interested in any contract made by him in his official capacity, or by any body or board of which he is a member, except as provided in section 18-1361, Idaho Code.

(e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office, or appoint or furnish employment to any person whose salary, wages, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other public servant when such appointment is made on the agreement or promise of such other public servant or any other public servant to appoint or furnish employment to anyone so related to the public servant making or voting for such appointment. Any public servant who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public fund of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in this chapter.

(2) No person related to any member of the legislature by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty within the legislative branch of government or otherwise be employed by the legislative branch of government when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

(3) No person related to a mayor or member of a city council by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty with the mayor's or city council's city when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

(4) No person related to a county commissioner by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty with the commissioner's county when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

(5)(a) An employee of a governmental entity holding a position prior to the election of a local government official, who is related within the second degree, shall be entitled to retain his or her position and receive general pay increases, step increases, cost of living increases, and/or other across the board increases in salary or merit increases, benefits and bonuses or promotions.

(b) Nothing in this section shall be construed as creating any property rights in the position held by an employee subject to this section, and all authority in regard to disciplinary action, transfer, dismissal, demotion or termination shall continue to apply to the employee.

(6) The prohibitions contained within this section shall not include conduct defined by the provisions of section 59-703(4), Idaho Code.

(7) The prohibitions within this section and section 18-1356, Idaho Code, as it applies to part-time public servants, do not include those actions or conduct involving the public servant’s business, profession or occupation and unrelated to the public servant’s official conduct, and do not apply to a pecuniary benefit received in the normal course of a legislator’s business, profession or occupation and unrelated to any bill, legislation, proceeding or official transaction. [I.C., § 18-1359, as added by 1990, ch. 328, § 2, p. 899; am. 1991, ch. 305, § 1, p. 800; am. 2002, ch. 304, § 1, p. 867; am. 2004, ch. 316, § 1, p. 887.]

Compiler’s notes. Sections 1 and 3 of S.L. 1990, ch. 328 are compiled as §§ 18-1351 and 18-1356, respectively.

Section 2 of S.L. 2002, ch. 304 declared an

emergency. Approved March 26, 2002.

Sec. to sec. ref. This section is referred to in §§ 18-1361, 18-1361A, 33-5204 and 67-455A.

18-1360. Penalties. — Any public servant who violates the provisions of this chapter, unless otherwise provided, shall be guilty of a misdemeanor and may be punished by a fine not exceeding one thousand dollars (\$1,000), or by incarceration in the county jail for a period not exceeding one (1) year, or by both such fine and incarceration. In addition to any penalty imposed in this chapter, any person who violates the provisions of this chapter may be required to forfeit his office and may be ordered to make restitution of any benefit received by him to the governmental entity from which it was obtained. [I.C., § 18-1360, as added by 1990, ch. 328, § 2, p. 899.]

Compiler’s notes. Sections 1 and 3 of S.L. 1990, ch. 328 are compiled as §§ 18-1351 and 18-1356, respectively.

Sec. to sec. ref. This section is referred to in § 33-5204.

18-1361. Self-interested contracts — Exception. — Where there are less than three (3) suppliers of a good or a service within a fifteen (15) mile radius of where the good or service is to be provided, it shall not constitute a violation of the provisions of subsection (1)(d) or (e) of section 18-1359, Idaho Code, for a public servant or for his relative to contract with the public body of which the public servant is a member if the contract is reasonably necessary to respond to a disaster as defined in chapter 10, title 46, Idaho Code, or if the procedures listed below are strictly observed. For purposes of this section, “relative” shall mean any person related to the public servant by blood or marriage within the second degree.

(1) The contract is competitively bid and the public servant or his relative submits the low bid; and

(2) Neither the public servant nor his relative takes any part in the preparation of the contract or bid specifications, and the public servant

takes no part in voting on or approving the contract or bid specifications; and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his interest or that of his relative and of his or his relative's intention to bid on the contract; and

(4) Neither the public servant nor his relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business. [I.C., § 18-1361, as added by 1990, ch. 328, § 2, p. 899; am. 1991, ch. 34, § 1, p. 71; am. 1996, ch. 193, § 1, p. 601.]

Compiler's notes. Sections 1 and 3 of S.L. 1990, ch. 328 are compiled as §§ 18-1351 and 18-1356, respectively.

Sec. to sec. ref. This section is referred to in §§ 18-1359, 33-507 and 33-5204.

18-1361A. Noncompensated appointed public servant — Relatives of public servant — Exception. — When a person is a public servant by reason of his appointment to a governmental entity board for which the person receives no salary or fees for his service on said board, it shall not constitute a violation of the provisions of subsection (1)(d) or (e) of section 18-1359, Idaho Code, for a public servant or for his relative to contract with the public body of which the public servant is a member if the procedures listed below are strictly observed. For purposes of this section, "relative" shall mean any person related to the public servant by blood or marriage within the second degree.

(1) The contract is competitively bid and the public servant or his relative submits the low bid; and

(2) Neither the public servant nor his relative takes any part in the preparation of the contract or bid specifications, and the public servant takes no part in voting on or approving the contract or bid specifications; and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his interest or that of his relative and of his or his relative's intention to bid on the contract; and

(4) Neither the public servant nor his relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business. [I.C., § 18-1361A, as added by 1992, ch. 121, § 1, p. 398; am. 1996, ch. 193, § 2, p. 601.]

Compiler's notes. Section 2 of S.L. 1992, ch. 121 is compiled as § 59-209.

Section 3 of S.L. 1996, ch. 193 is compiled as § 33-507.

Section 4 of S.L. 1996, ch. 193 declared an emergency. Approved March 12, 1996.

Sec. to sec. ref. This section is referred to in §§ 33-507, 33-5204, 59-209 and 59-704A.

18-1362. Cause of action. — A prosecuting attorney or the attorney general may bring an action in the district court of the county in which a public servant resides to enjoin a violation of the provisions of this chapter and to require the public servant to make restitution to the government of any pecuniary gain obtained. The prevailing party shall be awarded his costs and reasonable attorney fees. [I.C., § 18-1362, as added by 1990, ch. 328, § 2, p. 899.]

Compiler's notes. Sections 1 and 3 of S.L. 1990, ch. 328 are compiled as §§ 18-1351 and 18-1356, respectively.

Sec. to sec. ref. This section is referred to in § 33-5204.

CHAPTER 13A

BRIBERY AND CORRUPT INFLUENCE

Compiler's notes. The sections previously carried in this chapter, §§ 18-1351 — 18-1361, have been combined into Chapter 13,

Bribery and Corruption. See Compiler's note following the Chapter 13, title 18, Idaho Code heading.

CHAPTER 14

BURGLARY

SECTION.

18-1401. Burglary defined.

18-1402. [Repealed.]

18-1403. Punishment for burglary.

18-1404. [Repealed.]

SECTION.

18-1405. Burglary with explosives.

18-1406. Possession of burglarious instruments.

18-1407 — 18-1415. [Repealed.]

18-1401. Burglary defined. — Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary. [I.C., § 18-1401, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 183, § 3, p. 319; am. 1997, ch. 87, § 1, p. 212.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 59; R.S., R.C., & C.L., § 7014; C.S., § 8400; I.C.A., § 17-3401; am. 1963, ch. 293, § 1, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1401, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 2 of S.L. 1981, ch. 183 is compiled as §§ 18-2401 — 18-2409.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Theft, consolidation of offenses, §§ 18-2401, 18-2402.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-7803, 19-2520 and 19-5506.

Cited in: State v. Wolfe, 99 Idaho 382, 582 P.2d 728 (1978); State v. Stewart, 100 Idaho 185, 595 P.2d 719 (1979); State v. Talmage, 104 Idaho 249, 658 P.2d 920 (1983); State v. Payne, 105 Idaho 427, 670 P.2d 528 (1983);

State v. Decker, 106 Idaho 434, 680 P.2d 255 (Ct. App. 1984); State v. Davis, 106 Idaho 563, 682 P.2d 104 (Ct. App. 1984); State v. Rendon, 107 Idaho 425, 690 P.2d 360 (Ct. App. 1984); State v. Mathis, 107 Idaho 685, 691 P.2d 1300 (Ct. App. 1984); State v. Keller, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985); State v. Clayton, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987); State v. Staha, 114 Idaho 119, 753 P.2d 1265 (Ct. App. 1988); State v. Samuelson, 114 Idaho 550, 758 P.2d 709 (Ct. App. 1988); State v. Chacon, 114 Idaho 789, 760 P.2d 1205 (Ct. App. 1988); State v. Knapp, 120 Idaho 343, 815 P.2d 1083 (Ct. App. 1991); State v. Brower, 122 Idaho 450, 835 P.2d 685 (Ct. App. 1992); State v. Laymon, 122 Idaho 452, 835 P.2d 687 (Ct. App. 1992); State v. Marsh, 122 Idaho 854, 840 P.2d 398 (Ct. App. 1992); State v. Bayles, 131 Idaho 624, 962 P.2d 395 (Ct. App. 1998); State v. Miller, 134 Idaho 458, 4 P.3d 570 (Ct. App. 2000); State v. Cheatham, 134 Idaho 565, 6 P.3d 815 (2000); State v. Custodio, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001); Brown v. State, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002); Goodwin v. State, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002); Laughlin v. State, — Idaho —, 85 P.3d 1125 (Ct. App. 2003).

ANALYSIS

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Breaking and Entry.

Breaking that was required at common law is not essential element of crime in this state. *State v. Sullivan*, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

Entry made through front door of poolroom during business hours might constitute burglary, if with felonious intent. *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

Defendant remaining on outside in capacity of a lookout may be found guilty of burglary as principal. *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

To sustain conviction for burglary there must be proof of breaking and entering. Evidence that accused tore down a shed and took it away without proof that they entered it was insufficient. *State v. Allen*, 53 Idaho 603, 26 P.2d 177 (1933).

Breaking is not an essential element of the crime of burglary under this section. *State v. Vanek*, 59 Idaho 514, 84 P.2d 567 (1938).

The "breaking" required at common law to constitute the crime of burglary is not an essential element of the crime under this section. Consequently, the information need not allege an unlawful "breaking." *State v. Vanek*, 59 Idaho 514, 84 P.2d 567 (1938).

Building.

An inn was a building within the meaning of the former section. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

Conviction under the former statute did not require proof of ownership of building entered or of personal property taken therein, but only that accused entered with intent to commit grand or petit larceny or any felony. *State v. Carver*, 94 Idaho 677, 496 P.2d 676 (1972).

Closed Vehicle.

Tested by its character and use, a truck camper may properly be considered a closed vehicle within the contemplation of the burglary statute. *State v. Martinez*, 122 Idaho 158, 832 P.2d 331 (Ct. App. 1992).

District court properly granted defendant's motion to dismiss, holding that no burglary had been shown as the State had failed to show that the truck was a "closed vehicle," within the meaning of this section in light of testimony that thief had reached through an open window of the truck to gain access to a stolen tape player. *State v. Martinez*, 126 Idaho 801, 891 P.2d 1061 (Ct. App. 1995).

Where defendant reached through a narrow opening in the top of a partially rolled down window, unlocked the door, opened the door, and entered the vehicle in furtherance of his theft of a stereo, the act of opening the door breached a barrier of the vehicle which had been closed to public intrusion and constituted a breaking. *State v. Ortega*, 130 Idaho 637, 945 P.2d 863 (Ct. App. 1997).

Conviction Affirmed.

As burglary statute proscribed the entry into an office in a hospital with the intent to commit a theft, and defendant was in possession of items taken from the office when arrested, defendant's conviction for burglary was affirmed. *State v. Smith*, — Idaho —, 77 P.3d 984 (Ct. App. 2003).

Disposing of Stolen Property.

Disposing of stolen property is not a lesser included offense of the crime of burglary. *State v. Martin*, 104 Idaho 195, 657 P.2d 492 (Ct. App. 1983).

Double Jeopardy.

In light of the purpose of the Major Crimes Act (MCA) and uniform authority, defendant's argument that the district court should have applied Idaho's double jeopardy law failed, because what Idaho courts might think about the legality of defendant's federal prosecution was irrelevant, and, the MCA's incorporation of state law for burglary notwithstanding, the offense for which defendant was prosecuted was a federal offense, and whether defendant's prosecution violated the Double Jeopardy Clause is a federal issue to be determined by reference to federal constitutional principles. *United States v. Pluff*, 253 F.3d 490 (9th Cir. 2001).

Evidence.

Possession of burglarious tools as evidence in connection with charge of burglary can only

be considered where burglary is first shown to have been committed. *State v. Sullivan*, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

Where burglarious entry has been proved, it may be shown that property allegedly stolen was found in accused's possession. *State v. Sullivan*, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

Want of consent to taking of property may be shown by means other than testimony of owner. *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

The evidence must prove beyond a reasonable doubt that there was an entry, and if the evidence leaves this element to conjecture, it falls short of the requirements of the law. *State v. Allen*, 53 Idaho 603, 26 P.2d 177 (1933).

Petitioner was properly held on charge of burglary where evidence at preliminary hearing showed that he pried open a locked window and entered darkened house of people away from home though police stationed inside arrested him before he could steal anything. *Ex parte Seyfried*, 74 Idaho 467, 264 P.2d 685 (1953).

There was sufficient evidence to convict defendant of attempted burglary where the evidence showed that night watchman discovered that a person was attempting to break in and fired through the door and defendant was found eight to 12 feet from the door with bullet wounds in his arm and leg, two screwdrivers were found near the body of the defendant, and the car of the defendant was found parked close by. *State v. Bedwell*, 77 Idaho 57, 286 P.2d 641 (1955).

It was reversible error for the trial court to permit the prosecuting attorney upon a prosecution for burglary in the first degree to attempt to impeach the defendant by requiring him to testify about prior convictions of misdemeanors. *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

Evidence showing the presence of appellants in various stores, their identification and their taking sundry articles from those stores with thoroughly positive identification of the merchandise, that such articles were not sold to appellants and the finding of such articles in appellants' possession, was sufficient to warrant conviction. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959).

The surrounding circumstances and the record as a whole indicate sufficient evidence of appellant's intent upon entry into the department store to commit the crime of larceny. *State v. Peterson*, 87 Idaho 147, 391 P.2d 846 (1964).

Where the police found the door of a department store forced open, the lock of another door forced, and the defendant hiding behind the air conditioner on an adjoining roof that could be reached from the store's elevator

shaft, even though no burglar tools were found and nothing was missing from the store, such evidence was sufficient to conclude that defendant entered the store with the requisite intent to commit either grand or petit larceny and was guilty of burglary. *State v. Liston*, 95 Idaho 849, 521 P.2d 1028 (1974).

In a trial for theft of packages of meat from a grocery store, evidence of other meat packages from other stores found in the defendant's automobile without accompanying sales receipts was admissible as the packages were relevant to the defendant's intent and common scheme or plan. *State v. Matthews*, 108 Idaho 482, 700 P.2d 104 (Ct. App. 1985).

Evidence was sufficient to support the conviction. *State v. Kelling*, 108 Idaho 716, 701 P.2d 664 (Ct. App. 1985).

On appeal from a conviction for burglary in the second degree, where the defendant was found pounding on an electrical junction box in a warehouse not in use, the trial court properly admitted evidence of receipts from a recycling business which showed that the defendant had sold approximately two tons of scrap metal to the recycler in the three months preceding the arrest, since the receipts were relevant to show that the defendant entered the warehouse with the intent to steal materials. *State v. Whitfield*, 108 Idaho 877, 702 P.2d 915 (Ct. App. 1985).

Evidence of a forced entry will support a permissive inference of burglary with the requisite intent to commit larceny or a felony. *State v. Hoffman*, 109 Idaho 127, 705 P.2d 1082 (Ct. App. 1985).

It was not error for the trial court to allow the police officer to testify about his observations of the defendant's shoe and his comparison of the shoeprint at the scene of the burglary with the tread pattern on the shoe; there is no reasonable expectation of privacy in the appearance of the soles of one's shoes. *State v. Hiassen*, 110 Idaho 608, 716 P.2d 1380 (Ct. App. 1986).

The testimony of dog handlers whose dogs were scented and placed on a trail within three to five hours after the burglary, near where witnesses observed a man running, was admissible corroborating evidence of the defendant's involvement in the burglary. *State v. Streeper*, 113 Idaho 662, 747 P.2d 71 (1987).

Where a reasonable juror could have inferred that the crash, heard by the manager of the grain and feed store prior to sunrise, was caused by the burglar's escape from the building, the evidence supported a conviction in the first degree. *State v. Streeper*, 113 Idaho 662, 747 P.2d 71 (1987).

Evidence of a forced entry will support a permissive inference of burglary with the requisite intent to commit a theft and because the record shows that defendant made a

forced entry into the home, the required intent to commit a theft, at the time defendant entered the home, was established by the evidence. *State v. Knutson*, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991).

—Confession.

The de facto father-son relationship between the defendant and the police officer did not render the defendant's statements involuntary where the preponderance of the evidence established the voluntariness of the defendant's inculpatory statement. *State v. Hiassen*, 110 Idaho 608, 716 P.2d 1380 (Ct. App. 1986).

—Harmless Error.

Although testimony about defendant's drug addiction should not have been admitted to show motive to commit burglary and battery with the intent to commit robbery, the error was harmless. *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993).

Firearms Enhancement.

Where the evidence showed that a shot was fired after defendant and another person attempted to escape after entering a victim's barn, there was sufficient evidence that defendant displayed, used, threatened, or attempted to use a firearm while committing or attempting to commit a burglary. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Guilty Plea.

—Acceptance.

Where the total record contained evidence from which strong inferences arose that defendant intended to commit theft when he broke into restaurant, defendant's assertion in presentence report of his lack of criminal intent was not sufficient to raise an obvious doubt as to his guilt, and the court did not err in accepting defendant's guilty plea. *Fowler v. State*, 109 Idaho 1002, 712 P.2d 703 (Ct. App. 1985).

—Effect.

A defendant's pleas of guilty to counts of first-degree burglary, voluntarily and understandingly given, barred his challenge in the Supreme Court to the trial court's denial of defendant's motion to suppress his oral confession, for the question of whether the confession would have been admissible at trial was no longer relevant. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978).

Given the defendant's voluntary entry of pleas of guilty and express admission of guilt to first degree burglary charges, the court was not obliged to establish a further factual basis for the charges and did not err in accepting defendant's pleas of guilty to first degree burglary charges at arraignment hearing.

State v. Coffin, 104 Idaho 543, 661 P.2d 328 (1983).

Where, at the sentencing hearing, the court noted its concern that defendant pleaded guilty to first degree burglary while maintaining his innocence, i.e., that he had entered the premises in the daytime, and the defendant was given ample opportunity to withdraw his plea but nevertheless made a reasoned decision to continue with his pleas of guilty consistent with the terms of his plea bargain, this was clearly a case in which the defendant intelligently concluded that it was in his own best interest to enter a plea of guilty to the crimes charged. He chose to take his chances that the trial court would exercise leniency in sentencing, as opposed to facing the additional charges which were dismissed upon the court's acceptance of his pleas, and, having struck a plea bargain with the prosecutor and insisting upon following that bargain when given the opportunity to withdraw his plea, defendant could not be heard to complain that the district court's acceptance of his pleas of guilty to the first degree burglary charges was in error. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983).

The defendant's plea of guilty to a burglary charge waived any challenge to the order denying his motion to suppress statements made to the police following his arrest; once his plea was accepted, the admissibility of his statements became irrelevant. *State v. Fowler*, 105 Idaho 642, 671 P.2d 1105 (Ct. App. 1983).

A valid plea of guilty, voluntarily and understandingly given, waives all nonjurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings; accordingly, the defendant's plea of guilty to a charge of burglary waived his right to contest the preliminary hearing procedure. *State v. Fowler*, 105 Idaho 642, 671 P.2d 1105 (Ct. App. 1983).

Where the defendant did not in any manner attempt to exercise his rights to silence and counsel, his waiver of rights was valid and his confession was voluntary and properly admitted. *State v. Hiassen*, 110 Idaho 608, 716 P.2d 1380 (Ct. App. 1986).

—Harmless.

Although testimony about defendant's drug addiction should not have been admitted to show motive to commit burglary and battery with the intent to commit robbery, the error was harmless. *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993).

Indictment and Information.

An information for burglary following in substance language of the statute is sufficient. *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

Under the statute but a single act is re-

quired to constitute the crime of burglary, to-wit, entry. Therefore, the entry of any house, etc., "with intent to commit grand or petit larceny or any felony," constitutes the crime of burglary. Information charging the commission of the act which constitutes the offense charges the fact or circumstance of the entry, and having charged the commission of that act in ordinary and concise language, and in such manner as to enable a person of common understanding to know what was intended, it follows that the information fully complies with every requirement of the statute. *State v. Vanek*, 59 Idaho 514, 84 P.2d 567 (1938).

Information charged attempted burglary where the information stated that the defendant on or about specified date and place did wilfully and feloniously attempt to break into and enter in the nighttime an identified building with intent to commit larceny therein. *State v. Bedwell*, 77 Idaho 57, 286 P.2d 641 (1955).

A trial court did not err in permitting a prosecuting attorney to amend an indictment by changing the charging code section from former § 18-1402 (repealed), which distinguished first degree burglary from second degree burglary, to this section which defines the crime of burglary in general, and the amendment did not have the effect of changing the offense with which the accused was charged. *State v. Bullis*, 93 Idaho 749, 472 P.2d 315 (1970).

Instructions.

Instruction by court in prosecution of defendant for burglary that the entry of the defendant must have been made feloniously and burglariously and with intent to commit larceny therein was sufficient, and the court was not required to instruct the jury on the theory of the defendant that he made the entry for a good and sufficient reason. *State v. Fedder*, 76 Idaho 535, 285 P.2d 802 (1955).

In a prosecution for burglary in the first degree, it was error for the court to refuse to give the following requested instruction: "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime." *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

Where the evidence linking a defendant to a burglary is entirely circumstantial, it is not sufficient that the court give instructions which only distinguish between direct and circumstantial evidence. It is error to refuse to give an instruction requested by the defendant informing the jury that a conviction cannot be based solely on circumstantial evidence, unless the circumstances are consistent with guilt and inconsistent with innocence, and incapable of explanation on any other reasonable hypothesis than that of

guilt. *State v. Curry*, 103 Idaho 332, 647 P.2d 788 (Ct. App. 1982).

Where the record in a burglary prosecution disclosed no special controversy about identification of the defendant, the district court did not err by refusing the defendant's proposed instruction focusing exclusively on identification. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

An appellate court, faced with a guilty verdict, is required to accept all justifiable inferences in support of the verdict, but it is for the jury to decide, in the first instance, whether to draw an inference, and how much weight to give it. Therefore, even if a conviction for burglary could be upheld on appeal, based upon an inference from possession of recently stolen property, it does not follow that the jury should be instructed on the sufficiency of the inference, by itself, to establish guilt since such language may distract the jury from its basic function — to determine, from all the evidence, whether the state has proven beyond a reasonable doubt each of the elements of burglary. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Intent.

Question of intent with which defendant entered building is for jury. *State v. Dwyer*, 33 Idaho 224, 191 P. 203 (1920); *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

Knowledge of any specific property within building on part of accused is not necessary to make act burglary. *State v. Dwyer*, 33 Idaho 224, 191 P. 203 (1920).

Where an intent to commit larceny or a felony was formed after the entry, a prosecution for burglary will not lie; the entry and the intent must be concomitant. *State v. Sullivan*, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

One of the essential ingredients of bank burglary is intent to commit larceny. One entering a scheme to trap or help trap bank burglars was not guilty. *State v. Bigley*, 53 Idaho 636, 26 P.2d 375 (1933).

If a dwelling house is broken and entered in the nighttime, without lawful motive or purpose, a presumption arises that the breaking and entering is with the intent to commit larceny. *Ex parte Seyfried*, 74 Idaho 467, 264 P.2d 685 (1953).

Having in mind the statutes pertaining to the offense under consideration and to proof of intent and those capable of committing crimes, it becomes clear that burglary is a crime *malum in se*, as differentiated from a crime *malum prohibitum*. *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

The gravamen of the crime of burglary is

that entry be made with intent to commit larceny. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959).

The key element of burglary is that intent to commit larceny, or any felony, must coincide with the entering. *State v. Carver*, 94 Idaho 677, 496 P.2d 676 (1972).

The crime of burglary is complete when there is an entry with the intent to commit grand or petit larceny or any felony; thus, if a burglar enters with the intent to commit a specific felony abandons or fails to perform that felony, he will still be guilty of burglary. *State v. McCormick*, 100 Idaho 111, 594 P.2d 149 (1979).

Where the defendant presented the defense that he was incapable of forming the necessary intent, an element of the crime of burglary, it was a question for the trier of fact to determine whether defendant's intoxication or voluntary use of drugs reached that level. *State v. Roles*, 100 Idaho 12, 592 P.2d 68 (1979).

Burglary is a crime of specific intent and the question of intent is for a jury to decide. Actual commission of a larceny is evidence from which a jury is entitled, but not required, to infer the requisite intent for burglary. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Larceny.

Since larceny is not in all cases a felony, entry into house with intent to commit larceny is burglary whether it is intended to commit either grand or petit larceny. *People v. Stapleton*, 2 Idaho (Hasb.) 47, 3 P. 6 (1884). See also *State v. Sullivan*, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

Larceny from building will not constitute crime of burglary unless entry was made with such intent. *State v. Sullivan*, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

The defendant's constitutional and statutory protection against double jeopardy was not violated when he was convicted of both burglary in the second degree and grand larceny, relating to the same general set of events, because each crime required proof of separate essential elements not required of the other; burglary was completed upon entry into a building with the intent to commit a felony while larceny, on the other hand, as defined at the time relevant to the prosecution of defendant, did not require entry into any building, but was committed by taking another's property with felonious intent. *Daugherty v. State*, 102 Idaho 782, 640 P.2d 1183 (Ct. App. 1982).

Opinion Testimony.

Even assuming that the admission of the opinion testimony of witness that two people

were involved in burglary was erroneous, no sufficient prejudice resulted thereby so as to require reversal, and the court's gratuitous comment that the jury could give the testimony what weight they felt it deserved was no more than a premature statement of the law that credibility is for the jury. In the context in which given, it more likely would have had a denigrating effect on the opinion testimony and did not constitute reversible error. *State v. Pratt*, 103 Idaho 816, 654 P.2d 909 (1982).

Outhouse or Other Buildings.

Under this section any outhouse or building may be subject of burglary regardless of whether it is subservient to dwelling. *State v. Marks*, 45 Idaho 92, 260 P. 697 (1927).

Giving word "outhouse" its usual and ordinary meaning which is usually smaller building subservient to and little distance from dwelling house, yet "outhouse" may be subservient and adjoining business building. *State v. Marks*, 45 Idaho 92, 260 P. 697 (1927).

Meaning of words "house" and "outhouse" as used in statute is generally understood and it is not necessary to define or explain them. *State v. Marks*, 45 Idaho 92, 260 P. 697 (1927).

Ownership of Building.

Statute does not require proof of ownership of building entered. Ownership is immaterial except for purpose of identification of building. *State v. Wansgaard*, 46 Idaho 20, 265 P. 671 (1928); *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

Persistent Violator.

Where defendant was involved in a series of home burglaries, he was properly convicted of seven counts of burglary in violation of Idaho Code § 18-1401, and one count of grand theft in violation of Idaho Code §§ 18-2403(1), -2407(1)(b). He was properly sentenced as a persistent violator under Idaho Code § 19-2514 to concurrent life sentences with ten years determinate on all of these charges. *State v. Dixon*, — Idaho —, — P.3d —, 2004 Ida. App. LEXIS 27 (Ct. App. Mar. 5, 2004).

Punishment.

A defendant who burglarizes a residence with the intent to commit rape, and then does in fact commit the rape, deserves to be punished more severely than a defendant who does not commit the intended act after he has entered the residence. *State v. McCormick*, 100 Idaho 111, 594 P.2d 149 (1979).

Rape.

Since neither rape nor burglary is a lesser included offense of the other, a burglary was complete when defendant entered the victim's residence with the intent to commit rape, whereas the rape was not committed until there was an act of sexual intercourse, and

each of these crimes required proof of separate essential elements not required of the other and the conviction of one would not bar conviction of the other. *State v. McCormick*, 100 Idaho 111, 594 P.2d 149 (1979).

"Room."

Appellate court has construed the term "room" in this section as having a nature similar to the other structures and objects capable of being burglarized. *State v. Smith*, — Idaho —, 77 P.3d 984 (Ct. App. 2003).

Sentence.

Where defendant, on probation for conspiring to deliver marijuana, was charged with first degree burglary in connection with the break-in at a bar, where he pled guilty and was sentenced to 11 years in prison, with a minimum term of three years, and where, in addition, the court revoked his probation on the conspiracy to deliver marijuana conviction and ordered that the previously-imposed sentence be executed and served concurrently with the burglary sentence, the sentence was not unduly severe. *State v. Kern*, 119 Idaho 295, 805 P.2d 501 (Ct. App. 1991).

Sentencing judge did not abuse his discretion where he sentenced a defendant convicted of two counts of first degree burglary and battery with intent to commit rape, to 25 years, with ten years indeterminate following a minimum period of confinement of 15 years on each of the three felony counts; ordinarily, each felony would carry a maximum penalty of not more than 15 years, however, because the jury found that the defendant was a persistent violator, the maximum permissible sentence for each of the felonies was extended to imprisonment for life. *State v. Haggard*, 119 Idaho 664, 809 P.2d 525 (Ct. App. 1991).

The court determined that a unified sentence of 11 years, with a three-year minimum period of confinement, should be imposed for defendant's conviction of first degree burglary, since defendant's criminal record included prior convictions for first degree burglary and he had been released from custody on the last conviction just five months before committing the instant burglary; therefore, not being a fit candidate for probation, the sentence was reasonable. *State v. Gorham*, 120 Idaho 576, 817 P.2d 1100 (Ct. App. 1991).

Two concurrent unified sentences of 15 years in the custody of the Board of Corrections, with a minimum period of confinement of six years for two counts of first degree burglary, were not unreasonable where the crimes charged were residential burglaries, defendant had a misdemeanor and felony criminal record, which was extensive and included previous convictions for first degree burglary and grand larceny and while incarcerated on these convictions, he was convicted of felony possession of a controlled substance

by an inmate and received a concurrent indeterminate two-year sentence. *State v. Hoffman*, 121 Idaho 131, 823 P.2d 165 (Ct. App. 1991).

A fixed sentence of two years followed by an indeterminate term of three years for second degree burglary was not unreasonable where defendant had a prior criminal record, including two felony convictions as an adult, defendant was on parole for an auto theft conviction in California at the time he committed the current offense and the presentence investigator stated that defendant appeared to be a manipulative individual who showed no remorse for his victims, and concluded that he was not a suitable candidate for probation. *State v. Sands*, 121 Idaho 1023, 829 P.2d 1372 (Ct. App. 1992).

Although the court was made aware, through the presentence report, of the physical and emotional abuse suffered by defendant as a child, the judge was concerned about defendant's prior criminal record, which included juvenile problems, convictions for theft, a sexual abuse of a minor child, probation and parole violations, and his failure to conform to the standards expected of a twenty-year old man; therefore, an aggregate of four years in the custody of the Board of Correction, with a minimum term of nine months, after pleading guilty to second-degree burglary was not an abuse of sentencing discretion. *State v. Birky*, 121 Idaho 527, 826 P.2d 488 (Ct. App. 1992).

Based upon the facts and circumstances of the offenses and defendant's character, the District Court did not clearly abuse its discretion in sentencing defendant or in denying his I.C.R., Rule 35 motion where defendant was convicted of first degree burglary, first degree kidnapping, and aggravated battery against his ex-wife. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

The court did not abuse its discretion in imposing a minimum of seven years with a unified sentence of fifteen years for first degree burglary, which was enhanced for the use of a deadly weapon to a fixed twelve-year sentence and an indeterminate sentence of twenty-five years and the same sentence for battery with intent to commit a serious felony, with the same enhancement, on a burglary charge where the presentence investigation report revealed felony convictions for two previous robberies and one battery on a peace officer along with a number of felony burglary and robbery charges that were reduced or the disposition was unknown. *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993).

Where minimum three-year sentences defendant received were well below the maximum 25 years of incarceration the district court could have imposed through consecutive sentences, defendant's sentences were not

grossly disproportionate to the crimes committed and did not constitute cruel and unusual punishment under the Eighth Amendment. *Evans v. State*, 127 Idaho 662, 904 P.2d 574 (Ct. App. 1995).

Vacation of the defendant's consecutive determinate ten-year sentence for burglary was required where the record suggested that the district court went beyond its authority to consider a spectrum of evidence bearing upon the defendant's character and essentially imposed a sentence for offenses other than the one before the court. *State v. Findeisen*, 133 Idaho 228, 984 P.2d 716 (Ct. App. 1999).

Shoplifting.

This section is not unduly harsh because it authorizes felony convictions for entering commercial establishments during business hours with the intent to shoplift. *Matthews v. State*, 113 Idaho 83, 741 P.2d 370 (Ct. App. 1987).

Time of Entry.

The crime of burglary is committed by the entrance into a building with the intent described in this section, regardless of the time

of day or night when the entry occurs, and the time of the entry, as to whether day or night, affects only the degree of the offense. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963); *State v. Haggard*, 89 Idaho 217, 404 P.2d 580 (1965).

Value of Articles Taken.

Value of slot machines taken by defendant in burglary was immaterial as far as his guilt of crime of burglary was concerned, since the burglary was shown by the breaking and entering, and the fact that the slot machines could only be used for an illegal purpose had nothing to do with the offense charged. *State v. Johnson*, 77 Idaho 1, 287 P.2d 425 (1955), cert. denied, 350 U.S. 1007, 76 S. Ct. 649, 100 L. Ed. 869 (1956).

All that needed to be proved under the former statute was the entry into one of several named structures with intent to commit grand or petit larceny or any felony and it did not require the theft of any quantity or quality of personal property and it was therefore not necessary to prove the value of the items burglarized. *State v. Bullis*, 93 Idaho 749, 472 P.2d 315 (1970).

DECISIONS UNDER PRIOR LAW

First-Degree Burglary.

Where the evidence as to the time of burglary is such that it could have been committed between 4 p.m. and sunset on one day or between sunrise and 7:45 of the following day or during the night, the jury's verdict of guilty must be limited to burglary of the second degree. *State v. Darrah*, 92 Idaho 25, 435 P.2d 914 (1968).

It was not error for the court to refuse to instruct the jury that second degree burglary was an included offense in first degree burglary where the evidence clearly showed that the burglary took place between 9 p.m. and 11:30 p.m. or did not take place at all. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

Where two police officers identified defendant as man they saw fleeing from bar which had just been burglarized, there was substantial evidence to sustain conviction of first-degree burglary. *State v. Sena*, 106 Idaho 25, 674 P.2d 454 (Ct. App. 1983).

In a burglary prosecution where the trial court's allowing the prosecution to amend the information adding the words "in the night time" did not add nor change the offense and the accused was neither surprised nor prejudiced by such amendment, the court did not err. *State v. Ranstrom*, 94 Idaho 348, 487 P.2d 942 (1971).

Collateral References. 13 Am. Jur. 2d, Burglary, § 1 et seq.

12A C.J.S., Burglary, § 1 et seq.

Entrapment to commit crime. 18 A.L.R. 155; 66 A.L.R. 478; 86 A.L.R. 263.

"Outhouse," what is, within the meaning of the statute as to breaking and entering. 20 A.L.R. 236.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering. 23 A.L.R. 112.

Burglary without breaking. 23 A.L.R. 288.

Reduction by appellate court of punishment imposed by trial court. 29 A.L.R. 313; 89 A.L.R. 295.

Receiving or concealing the stolen property, may participant in burglary be convicted of. 136 A.L.R. 1087.

Outbuilding or the like as part of "dwelling house." 43 A.L.R.2d 831.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery. 51 A.L.R.2d 1396.

Sufficiency of showing that burglary was committed at night. 82 A.L.R.2d 643.

Breaking and entering of inner door of building as burglary. 43 A.L.R.3d 1147.

Entry through partly opened door or window as burglary. 70 A.L.R.3d 881.

Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering. 20 A.L.R.4th 349.

What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

18-1402. Degrees of burglary. [Repealed.]

Compiler's notes. Former § 18-1402, 1972, ch. 336, § 1, p. 844, was repealed by which comprised I.C., § 18-1402, as added by S.L. 1992, ch. 167, § 1.

18-1403. Punishment for burglary. — Burglary is punishable by imprisonment in the state prison for not less than one (1) nor more than ten (10) years. [I.C., § 18-1403, as added by 1972, ch. 336, § 1, p. 844; am. 1992, ch. 167, § 2, p. 531.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 59; R.S., R.C. & C.L., § 7016; C.S., § 8402; I.C.A., § 17-3403, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1403, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 3 of S.L. 1992, ch. 167 is compiled as § 18-1405.

Cited in: State v. Lovejoy, 60 Idaho 632, 95 P.2d 132 (1939); State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963); State v. Haggard, 89 Idaho 217, 404 P.2d 580 (1965); State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972); State v. Wolfe, 99 Idaho 382, 582 P.2d 728 (1978); State v. Sutton, 106 Idaho 403, 679 P.2d 680 (Ct. App. 1984); State v. Lopez, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984); State v. Spurgeon, 107 Idaho 173, 687 P.2d 17 (Ct. App. 1984); State v. Kelling, 108 Idaho 716, 701 P.2d 664 (Ct. App. 1985); State v. Russell, 109 Idaho 723, 710 P.2d 633 (Ct. App. 1985); State v. Haggard, 110 Idaho 335, 715 P.2d 1005 (Ct. App. 1986); State v. Hassett, 110 Idaho 570, 716 P.2d 1342 (Ct. App. 1986); State v. Clayton, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987); State v. Thomas, 112 Idaho 1134, 739 P.2d 433 (Ct. App. 1987); State v. Cline, 113 Idaho 90, 741 P.2d 377 (Ct. App. 1987); State v. Smith, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989); State v. Beboer, 119 Idaho 1020, 812 P.2d 327 (Ct. App. 1991); State v. Knapp, 120 Idaho 343, 815 P.2d 1083 (Ct. App. 1991); State v. Brower, 122 Idaho 450, 835 P.2d 685 (Ct. App. 1992); State v. Marsh, 122 Idaho 854, 840 P.2d 398 (Ct. App. 1992); State v. Cagle, 126 Idaho 794, 891 P.2d 1054 (Ct. App. 1995); Goodwin v. State, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002).

ANALYSIS

Ameliorative sentencing amendment.

Conviction for felony.

Court inquiry into indigency.

Maximum penalty not imposed.

Offense charged by information.

Rehabilitative treatment considered.
Sentence.

— Excessive.

— Not excessive.

— Upheld.

Ameliorative Sentencing Amendment.

A defendant is entitled to benefit from an ameliorative sentencing amendment that took effect between the time the crime was committed and the time judgment of conviction and sentence was entered. Therefore, defendant was entitled to benefit from the amendment to this section, effective July 1, 1992, which reduced the maximum sentence for burglary from fifteen years to ten years. Given this amendment, defendant's fifteen year sentence was illegal. State v. Morris, 131 Idaho 681, 954 P.2d 681 (Ct. App. 1998).

Conviction for Felony.

When the court pursuant to plea of guilty or verdict of a jury, adjudges the defendant guilty of burglary, he has been convicted of a felony within the meaning of §§ 19-2514 and 18-111. State v. O'Dell, 71 Idaho 64, 225 P.2d 1020 (1950).

Court Inquiry into Indigency.

Where trial court judge in burglary prosecution expressed concern over defendant's ability to post bond but inability to retain private counsel and informed defendant that he might subsequently be liable to the county for reimbursement for the legal services of a public defender, such statements did not indicate the prejudice against the defendant because of his use of a public defender so as to constitute an abuse of the court's sentencing discretion. State v. Bowcutt, 101 Idaho 761, 620 P.2d 795 (1980).

Maximum Penalty Not Imposed.

Imposition of indeterminate and concurrent sentences of 15 years for first degree burglary and 14 years for grand theft were not the maximum possible penalties; they were indeterminate rather than fixed, and concurrent rather than consecutive. State v. Hawkins, 115 Idaho 719, 769 P.2d 596 (Ct. App. 1989), aff'd, 117 Idaho 285, 787 P.2d 271 (1990).

Offense Charged by Information.

An information for burglary which did not charge whether offense was committed in the

daytime or the nighttime charged the offense of second degree burglary, and a special demurrer based on the ground that the charge did not state whether offense was committed in the daytime or the nighttime should not have been sustained. *State v. Eubanks*, 77 Idaho 439, 294 P.2d 273 (1956).

Rehabilitative Treatment Considered.

Where co-defendants convicted of burglary and grand theft, both claimed that the district court abused its discretion by refusing to retain jurisdiction to allow them to obtain rehabilitative treatment for their respective alcohol abuse problems, but where the district court had before it the presentence investigation reports which indicated that both co-defendants had extensive prior criminal records, the court properly concluded that both men would likely fail on any type of probation program and noted the importance of protecting society from them; the court also expressed its concern for both defendants' alcoholism and drug problems and recommended that both defendants be afforded the benefit of the alcohol and drug abuse counseling programs available in the penitentiary, thereby properly considering the relevant sentencing factors, and indicating no abuse of discretion in refusing to retain jurisdiction. *State v. Smith*, 119 Idaho 233, 804 P.2d 1364 (Ct. App. 1991).

Sentence.

There is no alternate sentence for burglary, and the punishment fixed by the former section was exclusive. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

Where the sentence imposed upon conviction for burglary is within the statutory limits, defendant has the burden of showing a clear abuse of discretion, which is dependent upon the circumstances of each case. *State v. Chapa*, 98 Idaho 54, 558 P.2d 83 (1976).

A sentence of five years imposed on a defendant convicted of second-degree burglary was within the statutory limits and there was no abuse of discretion where the court considered various alternatives before imposing such sentence on one who was a first offender in adult status but had a history of juvenile offenses. *State v. Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977).

Where defendant was sentenced by the district court to a term not to exceed 15 years in the custody of the Idaho board of corrections on each of three counts, the sentences to run concurrently, an examination of the defendant's past history, his personal problems, and the circumstances surrounding the offenses involved do not support the defendant's contentions that the trial court abused its discretion in imposing the sentence. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978).

Where at the time of the sentencing, defen-

dants were 21 and 20 years of age, respectively, and where their presentence reports, and earlier psychological reports portrayed two young men with very low IQs, either or both of the defendants should have been able to benefit, if at all, from what rehabilitative programs were available, within a 14 year period; therefore under these circumstances, to impose a sentence which was more than double the length of their current natural lives was excessive and unduly harsh. *State v. Dunnagan*, 101 Idaho 125, 609 P.2d 657 (1980).

Sentence of an indeterminate period not to exceed nine years was not excessive or an abuse of discretion where defendant pleaded guilty to five first-degree burglaries and had pleaded guilty to prior petit larceny which had been reduced from a felony, and where presentence report and testimony of witnesses testifying on his behalf were generally unfavorable. *State v. Bowcutt*, 101 Idaho 761, 620 P.2d 795 (1980).

Where trial court characterized defendant as leader of codefendant in committing burglaries based upon psychological evaluation found in presentence investigation, there was no abuse of discretion in sentencing defendant to an indeterminate sentence not to exceed nine years under this section. *State v. Bowcutt*, 101 Idaho 761, 620 P.2d 795 (1980).

Where the sentencing court admitted the testimony of the state's witnesses regarding the value of merchandise taken during burglary for which defendant was convicted, there was no abuse of discretion in sentencing defendant to an indeterminate sentence not to exceed nine years under this section. *State v. Bowcutt*, 101 Idaho 761, 620 P.2d 795 (1980).

Where in a burglary prosecution the evidence showed that the defendant had committed the crime while on probation from a court in Oregon, that the defendant had committed two misdemeanors while the instant prosecution was pending, and that the defendant, who was 20 years old at the time of sentencing, had a history of violations as a juvenile, his five-year indeterminate sentence for second-degree burglary was not excessive nor unreasonable. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

A 15-year indeterminate sentence imposed upon the defendant following his conviction of first-degree burglary was not excessive, in light of the defendant's prior criminal record, which included numerous burglaries or other theft-related offenses, and such a sentence could be viewed as reasonably necessary to protect society from the defendant's established pattern of criminal conduct and to deter others from such conduct. *Heck v. State*, 103 Idaho 648, 651 P.2d 582 (Ct. App. 1982).

The trial court did not abuse its discretion

by imposing a ten-year indeterminate sentence on the defendant following his plea of guilty to first-degree burglary, where the presentence report showed that the defendant had recently been placed on probation in a sister state after serving a sentence in that state's correctional facility, and that the defendant had a lengthy adult criminal record including several felony convictions. *State v. Anderson*, 103 Idaho 622, 651 P.2d 556 (Ct. App. 1982).

The court's imposition of a five-year sentence upon conviction of second-degree burglary did not violate the defendant's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution where the record showed that prior to his latest conviction the defendant had been convicted of four felonies and, as a persistent violator, the defendant received the minimum sentence available. *State v. Angel*, 103 Idaho 624, 651 P.2d 558 (Ct. App. 1982).

Where trial court reviewed defendant's lengthy criminal record, his history of probation violation, the relative frequency of his offenses, his pattern of living and demonstrated disregard for legal authority and the facts and circumstances surrounding the offenses involved and then determined that defendant and society would be best served by incarcerating the defendant for ten-year indeterminate terms on each of two first-degree burglary convictions, the sentences to run concurrently, and to an indeterminate five-year consecutive term for resisting arrest, there was no abuse of the trial court's sentencing discretion. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983).

Where the transcript of the sentencing hearing revealed that the trial judge considered the following in fixing the sentence on a second-degree burglary conviction: (1) the presentence report; (2) the defendant's character and criminal history; (3) the facts and conditions surrounding the offense; (4) the appropriateness of probation; (5) society's interest in the case; and, (6) arguments by counsel, the defendant failed to show that there was a clear abuse of discretion by the trial court and a five-year determinate sentence on the second-degree burglary conviction was affirmed. *State v. Pyne*, 105 Idaho 427, 670 P.2d 528 (1983).

The trial court did not abuse its discretion when it sentenced the defendant to a fixed term of 15 years for first-degree burglary where his presentence report disclosed that he was a violent and dangerous individual who was incapable of adjusting to society, and where the court determined that retribution, deterrence, and rehabilitation were not feasible considerations in light of the defendant's conduct and prior record. *State v. Fowler*, 105 Idaho 642, 671 P.2d 1105 (Ct. App. 1983).

Indeterminate sentence of ten years in custody of the Board of Correction for first-degree burglary was not an abuse of discretion where defendant was already on probation for another first-degree burglary conviction, his prior record also included numerous misdemeanors and he admitted a long history of drug abuse and where the judge noted defendant's prior record and the physical assault on one of the victims and also considered, in mitigation, defendant's youthful age. *State v. Ramsey*, 105 Idaho 898, 673 P.2d 1092 (Ct. App. 1983).

Where defendant was found guilty of first-degree burglary and of being a persistent offender, sentence of a determinate term of ten years in prison was well within the confines of the sentencing options available to the trial court and there was no abuse of discretion on the part of the trial judge. *State v. Sena*, 106 Idaho 25, 674 P.2d 454 (Ct. App. 1983).

Where the defendant upon pleading guilty to one count of burglary was sentenced for an indeterminate term not to exceed four years, the sentence was not unduly harsh nor excessive since the defendant had prior convictions for petit larceny, grand larceny and robbery. *State v. Decker*, 106 Idaho 434, 680 P.2d 255 (Ct. App. 1984).

Where the defendant pled guilty to five counts of first degree burglary and was sentenced to an indeterminate term of 15 years on each count, in light of the defendant's prior record and the nature of the present offenses, the trial court did not abuse its discretion in ordering that four of the sentences were to be served concurrently with each other but consecutive to the first sentence imposed. *State v. Yarbrough*, 106 Idaho 545, 681 P.2d 1020 (Ct. App. 1984).

Where the presentence report showed that the defendant had three prior felony convictions, as well as numerous misdemeanor offenses, the trial court did not abuse its discretion in sentencing him to an indeterminate 15-year sentence upon his conviction for first-degree burglary. *State v. Davis*, 106 Idaho 563, 682 P.2d 104 (Ct. App. 1984).

Concurrent indeterminate sentences of 20 years for rape, 15 years for burglary and five years for crime against nature were not unduly harsh and were not an abuse of discretion. *State v. Mahoney*, 107 Idaho 190, 687 P.2d 580 (Ct. App. 1984).

An indeterminate three-year sentence for first-degree burglary was well within the statutory maximum penalty and was not excessive given the nature of the offense and the character of the offender. *State v. Chapel*, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).

Where court believed that defendant's drug dependency would result in future criminal conduct, that protecting society was the most

pressing consideration, and that in light of defendant's conduct and prior record, retribution and deterrence would be furthered by a fixed term of confinement, the court did not abuse its discretion in sentencing defendant to a fixed seven-year sentence for burglary and a five-year indeterminate sentence for grand theft. *State v. Heistand*, 107 Idaho 218, 687 P.2d 1001 (Ct. App. 1984).

A sentence within the statutory maximum will not be deemed excessive unless the appellant shows that under any reasonable view of the facts the term of confinement is longer than appears necessary at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution; thus, where the defendant had been convicted of two burglaries in Oregon and was involved in five others in that state during the 18 months preceding his convictions in Idaho, and at the time of his arrest in Idaho, was in violation of the terms of probation he was serving for the state of Oregon, and had been involved in ten burglaries within a relatively short period of time prior to his Idaho convictions, the trial court did not abuse its discretion by making the sentences consecutive. *State v. Mathis*, 107 Idaho 685, 691 P.2d 1300 (Ct. App. 1984).

A ten year indeterminate sentence for first degree burglary was not excessive where defendant had an eighth grade education, a history of alcohol and substance abuse, no job skills, and three prior convictions for first degree burglary and the trial court noted that defendant needed a structured environment for a lengthy period of time. *State v. Mason*, 107 Idaho 904, 693 P.2d 1106 (Ct. App. 1984).

It is a well-established rule in Idaho that the sentence to be imposed in a particular case is within the discretion of the trial court; a sentence within the statutory maximum will not be disturbed unless a clear abuse of discretion is shown. *State v. Keller*, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985).

Where the defendant was party to a burglary where a large amount of money (over \$20,000) was stolen from an aged, blind woman on two separate occasions, and told others of the location of the easy money, which resulted in a further theft of over \$22,000, some of which was given to the defendant for repayment of a debt, an indeterminate sentence of 14 years for first-degree burglary, to run consecutively with concurrent indeterminate sentences for conspiracy to commit the crime of burglary in the second degree, §§ 18-1401 and 18-1701, burglary in the second degree, § 18-1401, and preventing the attendance of a witness, § 18-2604, was not an abuse of discretion. *State v. Keller*, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985).

A sentence of indeterminate 12-year terms for each of two grand theft charges and an indeterminate five-year term for a second-degree burglary conviction, with all sentences to run concurrently, was not excessive, where the measure of confinement was treated as four years, one-third of an indeterminate sentence, and defendant had a long history of alcohol and drug abuse, as well as prior confrontations with the law. *State v. Brandt*, 109 Idaho 728, 710 P.2d 638 (Ct. App. 1985);, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

Where the defendant had committed a number of offenses as a juvenile which would have been felonies had he been an adult, he allegedly committed a burglary while incarcerated for evaluation following a conviction for grand theft, and his arrest for the present burglary was only one and one-half months after he was paroled, an indeterminate sentence of five years for second-degree burglary, deemed for purposes of review to be 20 months, was not an abuse of discretion. *State v. Jennings*, 110 Idaho 334, 715 P.2d 1004 (Ct. App. 1986).

Where the presentence report showed that the defendant had been adjudicated under the Youth Rehabilitation Act for burglary, and as an adult, he was convicted of two first-degree burglaries and one second-degree burglary, all prior to the instant offense, a fixed sentence of five years for first-degree burglary was not excessive. *State v. Bishop*, 110 Idaho 689, 718 P.2d 602 (Ct. App. 1986).

The district judge did not abuse his discretion in sentencing the defendant to a ten-year indeterminate sentence for one of the burglaries, a concurrent ten-year fixed sentence for the battery, and a ten-year indeterminate sentence for the other burglary, where the court considered the criteria of protection of society, deterrence of the defendant and of others, retribution, rehabilitation, the defendant's background, and the nature of the crimes to which he had pled guilty. *State v. Reinke*, 111 Idaho 968, 729 P.2d 443 (Ct. App. 1986).

The district court did not abuse its discretion in sentencing the defendant to a five-year indeterminate sentence for escape and a ten-year indeterminate sentence for burglary, where the record showed the judge's concern that society be protected from the defendant's criminal activities, and consideration was given to the related objectives of deterrence, rehabilitation and retribution. *State v. Briggs*, 113 Idaho 71, 741 P.2d 358 (Ct. App. 1987).

A five-year period of confinement, without possibility of parole, was reasonable when viewed in light of the violent nature of the offense, the defendant's use of a deadly weapon, and the character of the offender,

who had previously committed other crimes and responded poorly to parole and probation. *State v. Staha*, 114 Idaho 119, 753 P.2d 1265 (Ct. App. 1988).

A five-year sentence with a two-year minimum period of confinement for second degree burglary was not excessive where the judge was concerned about the defendant's prior record and his disruptive behavior in jail. *State v. Koch*, 116 Idaho 571, 777 P.2d 1244 (Ct. App. 1989).

District judge acted within his discretion in rejecting probation and sentencing defendant convicted of burglary to a three-year term with a one-year minimum period of incarceration where the judge was unconvinced that defendant comprehended the import of a felony conviction, though he had no significant prior criminal record, and where the judge was concerned with defendant's exhibited recalcitrant attitude, which belied his stated interest in completing his formal education and undergoing counseling. *State v. Riley*, 119 Idaho 216, 804 P.2d 945 (Ct. App. 1991).

In light of the fact that alcohol treatment had, thus far, been unavailing and that defendant's criminal behavior existed prior to his indulgence in alcohol, the minimum period of confinement imposed by the defendant's sentences was not improper and did not constitute an abuse of discretion. *State v. Cagle*, 126 Idaho 794, 891 P.2d 1054 (Ct. App. 1995).

—Excessive.

Where the record did not show that the defendant could never be safely returned to society on parole, the fixed life sentence for convictions of first degree burglary and sexual abuse of a child was inappropriate. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

—Not Excessive.

The defendant's fixed five-year sentence for theft and a consecutive indeterminate sentence of five years for burglary were not excessive where at the time of sentencing, the defendant was 30-years-old, since the age of 16 he had engaged in a robbery, numerous burglaries, several thefts, and two acts of receiving stolen property, he had served time and had violated parole in another state, and was on parole when he came to this state and committed the instant offenses. *State v. Amerson*, 113 Idaho 183, 742 P.2d 438 (Ct. App. 1987).

A five-year fixed sentence for escape and a 15-year indeterminate sentence for burglary, to be served concurrently with each other but consecutively to the existing rape sentence, were not excessive, where the defendant was 23 when he committed the offenses, and he was an intelligent adult fully responsible for his actions. *State v. Maddock*, 113 Idaho 182, 742 P.2d 437 (Ct. App. 1987).

Indeterminate five-year sentence imposed upon conviction for first degree burglary where defendant had several prior felony convictions and a criminal record that began when he was 15-years-old was not an abuse of discretion. *State v. Samuelson*, 114 Idaho 550, 758 P.2d 709 (Ct. App. 1988).

Where the defendant entered guilty pleas to three counts of grand theft, one count of second degree burglary, two counts of petty theft, and one count of escape from a county jail and received a series of indeterminate sentences, some concurrent and some consecutive, aggregating a total of 15 years, his sentences were not excessive, even though he portrayed his part in the criminal proceedings after the escape as that of an unwilling participant, where the sentences were well within the maximum penalties which the judge could have imposed, the judge took into consideration the defendant's character, including the testimony of witnesses who spoke in his behalf, judge considered the seriousness of the crimes and the impact lesser sentences would have on the defendant and society, and the judge reasoned that although the defendant may have been coerced into escaping, he undertook the escape under his own free will and could have departed from his fellow escapees several times during their flight. *State v. Chacon*, 114 Idaho 789, 760 P.2d 1205 (Ct. App. 1988).

Defendant's 10-year sentence for first degree burglary was not excessive and the district court did not abuse its sentencing discretion where the evidence showed that defendant had a prior criminal record including numerous burglary and larceny offenses, had been incarcerated at least five previous times, including substantial prison sentences; at the time of his arrest, defendant was on probation for grand theft and he was then 28 years old, with a longtime history of severe drug and alcohol abuse. *State v. Harwood*, 115 Idaho 431, 767 P.2d 274 (Ct. App. 1988).

Identical concurrent 14-year sentences with a minimum period of confinement of ten years for attempted robbery and for first degree burglary were within the maximum penalties allowed by statute and were not excessive, even though no one was hurt and no money taken. *State v. Ellenwood*, 115 Idaho 813, 770 P.2d 822 (Ct. App. 1989).

Imposing a sentence of three years in prison with a minimum one-year confinement period for second-degree burglary, and a concurrent one-year sentence for petit theft for shoplifting \$42.00 worth of meat was not excessive where defendant had a lengthy record of shoplifting and other crimes, and defendant had made a commitment to rehabilitation after one of her prior convictions, yet no rehabilitation had occurred. *State v.*

Palacios, 115 Idaho 901, 771 P.2d 919 (Ct. App. 1989).

Imposition of concurrent 14-year sentences with three-year minimum periods of confinement for two forgery counts, and a concurrent five-year sentence with a three-year minimum confinement period for burglary was not excessive where the judge cited defendant's continuing record of criminal conduct. *State v. Alexander*, 115 Idaho 897, 771 P.2d 915 (Ct. App. 1989).

A term of 15 years, with a five-year minimum term of confinement, was not excessive with regard to defendant's conviction for first degree burglary and a life term with a ten-year minimum confinement period was not excessive with regard to his conviction for rape, where defendant entered the victim's home through a bedroom window, hid in a closet, jumped out wielding a large hunting knife, then proceeded to choke, strike and rape the victim, and where following the rape, he threatened and choked the victim again. *State v. Parker*, 117 Idaho 527, 789 P.2d 523 (Ct. App. 1990).

The court determined that a unified sentence of 11 years, with a three-year minimum period of confinement, should be imposed for defendant's conviction of first degree burglary since defendant's criminal record included prior convictions for first degree burglary and he had been released from custody on the last conviction just five months before committing the instant burglary; therefore, not being a fit candidate for probation, the sentence was reasonable. *State v. Gorham*, 120 Idaho 576, 817 P.2d 1100 (Ct. App. 1991).

Where the court imposed its sentence only after noting that defendant had been convicted of three separate burglaries before sentencing on the instant charge, and since 1988 defendant had been charged with eight burglaries, only five of which had been prosecuted, and he had been released on bail and was awaiting sentencing on another burglary conviction when he committed the instant offense there was no abuse of discretion in the sentence, and no error. *State v. Simmons*, 120 Idaho 672, 818 P.2d 787 (Ct. App. 1991).

Defendant was sentenced to five years with three years' minimum confinement on each burglary charge and to eight years with four years' minimum confinement on each grand theft offense and where defendant had pled guilty to avoid eight additional felony counts and had a lengthy juvenile record, the sentences imposed were reasonable, and the district court did not abuse its sentencing discretion. *State v. Rocklitz*, 120 Idaho 703, 819 P.2d 121 (Ct. App. 1991).

Defendant's seven-year sentence with a minimum period of confinement of two years, was well within the maximum punishment of

15 years which could have been imposed for first degree burglary, was not unduly severe, and in the absence of any factual information to support defendant's motion, the denial of the motion to modify was not an abuse of discretion. *State v. McGonigal*, 121 Idaho 123, 822 P.2d 1020 (Ct. App. 1991).

Two concurrent unified sentences of 15 years in the custody of the Board of Corrections, with a minimum period of confinement of six years for two counts of first degree burglary, were not unreasonable where the crimes charged were residential burglaries, defendant had a misdemeanor and felony criminal record, which was extensive and included previous convictions for first degree burglary and grand larceny and while incarcerated on these convictions, he was convicted of felony possession of a controlled substance by an inmate and received a concurrent indeterminate two-year sentence. *State v. Hoffman*, 121 Idaho 131, 823 P.2d 165 (Ct. App. 1991).

A sentence of a minimum period of confinement of eight years for conviction of rape, burglary, kidnapping and the infamous crime against nature was not unreasonable where defendant was on probation at the time he committed the crimes, he violated a restraining order and had a prior criminal record. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

A sentence of a 20-year minimum period of confinement for conviction of lewd conduct with a child under 16, and of a determinate period of 15 years without parole on each of three counts of burglary, was not excessive; psychologist opined that defendant's prognosis for establishing and maintaining non-offending behavior was poor, defendant admitted to previous conduct for sexual gratification, and his prior record included arrests for possession of controlled substances, probation violation, resisting arrest, driving while under the influence, numerous traffic violations, indecent exposure and public nuisance. *State v. Taylor*, 122 Idaho 218, 832 P.2d 1153 (Ct. App. 1992).

Defendant's sentences of a three year minimum period of confinement for lewd conduct with a minor child, and of three years minimum confinement for first-degree burglary, to be served concurrently, were not an abuse of discretion; defendant was on probation for grand theft and forgery convictions and presentence investigation revealed prior lewd and lascivious conduct with children. *State v. Harris*, 122 Idaho 216, 832 P.2d 1151 (Ct. App. 1992).

Defendant's unified sentence of 14 years with a minimum three-year term of incarceration for burglary, grand theft, and malicious injury to property was not excessive where

defendant, after breaking into his employer's building and stealing a wrecker, led police on a dangerous, high-speed chase that ended only when he crashed the truck into a police blockade. *State v. Tucker*, 123 Idaho 374, 848 P.2d 432 (Ct. App. 1993).

A five-year unified sentence, with four years' minimum confinement for second degree burglary, to be served concurrently with a preexisting grand theft sentence was reasonable, where defendant was on probation for the preexisting grand theft charge at the time the present burglary offense was committed. *State v. Branning*, 123 Idaho 977, 855 P.2d 62 (Ct. App. 1993) (decided prior to 1992 amendment).

Unified sentence of 15 years, with five years minimum confinement for burglary, was reasonable and was not an abuse of the court's sentencing discretion where defendant released on to the ground of former employer's building 13,000 gallons of a chemical mixture hoping to "shut down" the company and where defendant had a history of antisocial behavior indicating a willingness to violate the rights of others. *State v. Morris*, 123 Idaho 989, 855 P.2d 74 (Ct. App. 1993) (decided prior to 1992 amendment).

Imposition of sentence with a minimum period confinement of three years for second degree burglary was not an abuse of court's discretion considering defendant's past history of some twenty law violations dating back to 1968, most of which dealt with theft and burglary, and that based on this prior record the court felt that defendant was likely to re-offend. *State v. Gomez*, 124 Idaho 177, 857 P.2d 656 (1993).

Unified sentence of fifteen-year indeterminate term with nine years minimum confinement for burglary and grand theft was reasonable, where defendant had an extensive past history of burglary and theft. *State v. Gawron*, 124 Idaho 625, 862 P.2d 317 (Ct. App. 1993).

Where minimum three-year sentences defendant received were well below the maximum 25 years of incarceration the district court could have imposed through consecutive sentences, defendant's sentences were not grossly disproportionate to the crimes committed and did not constitute cruel and unusual punishment under the Eighth Amendment. *Evans v. State*, 127 Idaho 662, 904 P.2d 574 (Ct. App. 1995).

—Upheld.

The district judge did not abuse his discretion by imposing two concurrent sentences, consisting of two years fixed and six years indeterminate, without retaining jurisdiction

for first degree burglary and grand theft where defendant had recently turned 18 years old at the time of the burglary, and he and his accomplice burglarized the home involved, at night, on more than one occasion, took many miscellaneous items from the home and pawned some of them and "trashed" others and the presentence report indicated that defendant had committed various offenses as a juvenile which were equivalent to first degree burglary, grand theft, probation violation and other crimes. *State v. Christensen*, 121 Idaho 769, 828 P.2d 332 (Ct. App. 1992).

Sentence of five years, with a two-year minimum period of confinement, for second degree burglary, was not an abuse of discretion where burglary charge arose when defendant broke into a woman's home to watch her while she was taking a bath, defendant later admitted to the police that he had removed four pairs of panties and four brassieres from the residence, he also admitted that he had entered the home on other occasions also, to watch the woman and her daughter while they bathed or while they were asleep, he related that he would sexually stimulate himself while watching the woman, desired to develop a sexual relationship with her, and "was on the verge of committing a rape." *State v. Saxton*, 121 Idaho 781, 828 P.2d 344 (Ct. App. 1992).

A fixed sentence of two years followed by an indeterminate term of three years for second degree burglary was not unreasonable where defendant had a prior criminal record, including two felony convictions as an adult, defendant was on parole for an auto theft conviction in California at the time he committed the current offense and the presentence investigator stated that defendant appeared to be a manipulative individual who showed no remorse for his victims, and concluded that he was not a suitable candidate for probation. *State v. Sands*, 121 Idaho 1023, 829 P.2d 1372 (Ct. App. 1992).

Where defendant's criminal record spanned ten years, including his juvenile record, a sentence of five years with two years' fixed for first degree burglary, to be served concurrently with an identical sentence previously imposed in a separate case, and a sentence of ten years with three years' fixed for battery with the intent to commit rape, to be served consecutively to the sentence on the first degree burglary conviction were reasonable sentences under the circumstances. *State v. Acha*, 122 Idaho 744, 838 P.2d 873 (Ct. App. 1992).

Collateral References. 12A C.J.S., Burglary, § 137.

18-1404. Night time defined. [Repealed.]

Compiler's notes. Former § 18-1404, which comprised I.C., § 18-1404, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1992, ch. 167, § 1.

Another former section, which comprised R.S., R.C., & C.L., § 7017; C.S., § 8403;

I.C.A., § 17-3404, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972. A third former section which comprised I.C., § 18-1404, as added by 1971, ch. 143, § 1 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-1405. Burglary with explosives. — Any person who with intent to commit crime breaks and enters any building whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place within said building by use of nitroglycerin, dynamite, gunpowder or any other explosive, shall be deemed guilty of burglary with explosives. Any person duly convicted of burglary with explosives shall be sentenced to the penitentiary for a period of not less than ten (10) years, nor more than twenty-five (25) years. [I.C., § 18-1405, as added by 1972, ch. 336, § 1, p. 844; am. 1992, ch. 167, § 3, p. 531.]

Compiler's notes. A former section, which comprised 1909, p. 55, §§ 1, 2; reen. C.L., § 7018; C.S., § 8404; I.C.A., § 17-3405, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1405, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 2 of S.L. 1992, ch. 167 is compiled as § 18-1403.

Cross ref. Confiscation and disposition of explosives, § 19-3807.

Sec. to sec. ref. This section is referred to in §§ 18-7803 and 19-5506.

Collateral References. 13 Am. Jur. 2d, Burglary, §§ 73, 74.

18-1406. Possession of burglarious instruments. — Every person having upon him, or in his possession, a picklock, crow, key, bit, or other instrument or tool, with intent feloniously to break or enter into any building or who shall knowingly make or alter, or shall attempt to make or alter any key or other instrument above named, so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair, any instrument or thing, knowing, or having reason to believe, that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in this chapter shall be deemed a building within the meaning of this section. [I.C., § 18-1406, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 133; R.S., R.C., & C.L., § 7022; C.S., § 8405; I.C.A., § 17-3406, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1406, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Concealed and dangerous weapons, § 18-3302.

Possession of deadly weapon with intent to commit assault, § 18-3301.

Collateral References. 13 Am. Jur. 2d, Burglary, § 73 et seq.

12A C.J.S., Burglary, §§ 43 — 48.

Burglary, admissibility in prosecution for, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements. 143 A.L.R. 1199.

Validity, construction and application of

statutes relating to burglars' tools. 33
A.L.R.3d 798.

18-1407 — 18-1415. Fraudulent business practices. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-1407 — 18-1415, as added by 1971, ch. 143, § 1, effective January 1, 1972 were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

CHAPTER 15

CHILDREN AND VULNERABLE ADULTS

SECTION.

- 18-1501. Injury to children.
- 18-1502. Beer, wine or other alcohol age violations — Fines.
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- 18-1502B. Possession of inhalants by minors.
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- 18-1509. Enticing of children.
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SECTION.

- 18-1511. Sale or barter of child for adoption or other purpose penalized — Allowed expenses.
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- 18-1520. District courts — Injunctions — Trial — Orders of injunction.
- 18-1521. Uniform enforcement — Abrogation of existing ordinances — Further local ordinances banned.
- 18-1522. Unauthorized school bus entry — Notice.
- 18-1523. Tattooing, branding and body piercing of minors.

18-1501. Injury to children. — (1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one (1) year, or in the state prison for not less than one (1) year nor more than ten (10) years.

(2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any

child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

(3) A person over the age of eighteen (18) commits the crime of injury to a child if the person transports a minor in a motor vehicle or vessel as defined in section 67-7003, Idaho Code, while under the influence of alcohol, intoxicating liquor, a controlled substance, or any combination thereof, in violation of section 18-8004 or 67-7034, Idaho Code. Any person convicted of violating this subsection is guilty of a misdemeanor. If a child suffers bodily injury or death due to a violation of this subsection, the violation will constitute a felony punishable by imprisonment for not more than ten (10) years, unless a more severe penalty is otherwise prescribed by law.

(4) The practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child. [I.C., § 18-1501, as added by 1977, ch. 304, § 3, p. 852; am. 1996, ch. 167, § 1, p. 552; am. 1997, ch. 306, § 1, p. 910; am. 2001, ch. 49, § 1, p. 91.]

Compiler's notes. A former section, which comprised 1945, ch. 139, § 1, p. 208, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1501, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972, and replaced by I.C., § 18-1501, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 10, p. 1102, which was repealed by S.L. 1977, ch. 304, § 2.

Section 1 of S.L. 1977, ch. 304 is compiled as § 16-1605.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

See subdivision "Minors" in table of cross references to penal provisions in other volumes at end of this volume.

Sec. to sec. ref. This chapter is referred to in § 18-7905.

This section is referred to in §§ 6-1701, 16-1605, 18-310, 18-8001, 19-5307, 19-5506, 20-525A, 32-1208, 33-1208 and 39-1113.

Cited in: *State v. Troy*, 124 Idaho 211, 858 P.2d 750 (1993); *State v. Gardiner*, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995); *Sweaney v. Ada County*, 119 F.3d 1385 (9th Cir. 1997); *State v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999); *State v. Bower*, 135 Idaho 554, 21 P.3d 491 (Ct. App. 2001); *State v. Byington*, — Idaho —, 81 P.3d 421 (Ct. App. 2003).

ANALYSIS

Cocaine during pregnancy.
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Cocaine During Pregnancy.

The evidence adduced at trial, and the inferences that could justifiably be drawn from that evidence, supported the jury's conclusion that mother was criminally liable for willfully causing or permitting the infusion of cocaine into her infant son and thus, was guilty of felony injury to a child. *State v. Reyes*, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992).

Constitutionality.

This section is not unconstitutionally vague as it gives sufficient notice to parents that they may be subject to criminal prosecution, if they do not protect their children from unwarranted injuries. *State v. Peters*, 116 Idaho 851, 780 P.2d 602 (Ct. App. 1989).

Construction.

Subsection (1) of this section gives ample notice that conduct which causes or permits a child to suffer unjustifiable physical pain or mental suffering, or wilfully causes the health of a child to be injured, is proscribed conduct.

State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987), *aff'd*, 116 Idaho 580, 777 P.2d 1253 (1989).

Evidence.

Where, once in custody, the defendant asserted his right to counsel and spoke to an attorney, the police acted improperly when they subsequently initiated an interrogation of the defendant and administered a polygraph exam in the absence of the defendant's counsel, and therefore, the statements made by the defendant during such questioning were inadmissible in the prosecution for injury to a child. State v. Garner, 103 Idaho 468, 649 P.2d 1224 (Ct. App. 1982).

The trial court did not err by admitting into evidence 8 x 10 photographs depicting the results of alleged excessive corporal punishment upon an eight-year-old girl, where, subsequent to receiving these photographs into evidence the court cautioned the jurors that (1) the photos should not serve to inflame them to such an extent that they failed to consider all of the evidence in the case, and (2) they were to make their decision based upon all of the evidence presented to them. State v. Peters, 116 Idaho 851, 780 P.2d 602 (Ct. App. 1989).

In proving the elements of felony injury to a child, the state is required to show that the parent wilfully permitted the child to suffer under circumstances likely to produce great bodily harm, and the introduction of 8 x 10 photographs of the victim's bruises were relevant and admissible not only to show how the injuries were inflicted, but also to show that defendant could not help but be aware that serious injuries were being inflicted by her boyfriend's attempts to discipline her daughter. State v. Peters, 116 Idaho 851, 780 P.2d 602 (Ct. App. 1989).

Where defendant was charged with violating this section for injuring a child, the question of defendant's intent under this section opened the door for introduction of evidence of prior bad acts, where such evidence was logically relevant to the crime charged, and where evidence from approximately nine years earlier was not too remote in time since defendant had been incarcerated during part of that nine years. State v. Hassett, 124 Idaho 357, 859 P.2d 955 (Ct. App. 1993).

In prosecution for felony injury to a child, the district court did not err in refusing to give defendant's requested jury instruction regarding evidence that an abnormal mental condition prevented him from forming the mental state that is an element of the crime. State v. Patterson, 126 Idaho 227, 880 P.2d 257 (Ct. App. 1994).

Admission of testimony by victim's mother, in felony injury to child prosecution, about defendant's alleged attempt to choke mother

or about defendant's temper was in error where the only logical relevance of this evidence was to show defendant's propensity for violence—the very purpose for which use of other misconduct evidence is prohibited by I.R.E. 404. State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

Where the evidence against defendant, who was convicted of felony injury to child, was wholly circumstantial, the improper testimony about defendant's temper and his alleged choking of victim's mother was not harmless error; this evidence may have led the jury to a guilty verdict based upon an impermissible inference that defendant had a propensity to violence, rather than upon the evidence as to his guilt or innocence of the crime charged. State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

Expert Testimony.

Given the training and background of two expert witnesses, the trial court did not abuse its discretion in allowing them to give expert testimony as to possible causes of the injuries observed. State v. Merwin, 131 Idaho 1026, 962 P.2d 1026 (1998).

The studies used by the experts possessed sufficient indicia of reliability to meet the requirements under Rule 702 of the Rules of Evidence and court properly admitted expert testimony based on the studies. State v. Merwin, 131 Idaho 1026, 962 P.2d 1026 (1998).

Federal Crime.

The Indian Major Crimes Act, 18 U.S.C. § 1153, did not preempt state prosecution of an enrolled member of the Nez Perce Tribe under this section for felony injury to his infant daughter, an enrolled member of the Thlingit Tribe. State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987), *aff'd*, 116 Idaho 580, 777 P.2d 1253 (1989).

Great Bodily Harm.

—Sufficient Evidence for Jury.

The existence of a deep pond near outdoor concert spectators when viewed in combination with defendant's LSD intoxication presented sufficient evidence for the jury to decide if the combination created the likelihood that his child could suffer great bodily harm. State v. Enyeart, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993).

—Ultrahazardous Conditions.

The circumstances or conditions likely to produce great bodily harm or death need not be "ultrahazardous." State v. Enyeart, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993).

Improper Testimony.

Where, in prosecution for injuring a child, the mother of the victim voluntarily testified

that the defendant had previously pled guilty, and the evidence at trial was conflicting on the issue of guilt, the defendant's conviction was reversed, even though the trial court gave a cautionary instruction regarding such voluntary testimony. *State v. Simonson*, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987).

Jurisdiction.

Felony injury to a child falls within the criminal jurisdiction granted by Congress under Public Law 280 and accepted by Idaho in 1963 through its enactment of §§ 67-5101 to 67-5103. *State v. Marek*, 116 Idaho 580, 777 P.2d 1253 (Ct. App. 1989).

Jury Instructions.

Where a prosecution is based on the endangerment clause of Idaho Code § 18-1501(1), the applicable pattern instruction, Idaho Crim. Jury Instructions 1243, standing alone, is inadequate to convey to the jury the requirement that the State prove the defendants' awareness of the risk of harm, as actual injury or harm, is not an element of the crime, and endangerment alone, is sufficient for commission of the offense. *State v. Halbesleben*, — Idaho —, 75 P.3d 219 (Ct. App. 2003).

When a defendant is prosecuted under the endangerment clause of Idaho Code § 18-1501(1), some instruction on *mens rea*, beyond merely quoting the statute, is required to ensure that the jury understands the scope of the mental element, as otherwise, the phrase "willfully causes or permits such child to be placed in such situation that its person or health is endangered" might be interpreted by the jury as proscribing the act of willfully placing a child in a situation that is apparently safe, but that ultimately endangers the child. *State v. Halbesleben*, — Idaho —, 75 P.3d 219 (Ct. App. 2003).

Defendant's conviction for involuntary manslaughter for killing her child in the perpetration of an unlawful act was proper pursuant to Idaho Code § 18-1501(1) because the extrajudicial statements were corroborated by the fact that the child died while under the exclusive care of defendant and that statements about how he died were consistent with the autopsy results; further, the failure to give a jury instruction was harmless error as the verdict did not rest solely upon defendant having committed a battery since it rested upon the independent ground that she also committed injury to a child. *State v. Tiffany*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 44 (Mar. 25, 2004).

Parent's Duty.

Where a parent fails in the duty to protect his or her child and the child is injured as a result, the parent is deemed to be the cause of those injuries and may face criminal sanc-

tions. *State v. Peters*, 116 Idaho 851, 780 P.2d 602 (Ct. App. 1989).

Generally, a person will not face criminal liability for failing to aid another, however, where there is a parent-child relationship, the parent must come to the aid of the child. *State v. Peters*, 116 Idaho 851, 780 P.2d 602 (Ct. App. 1989).

Probation.

Where defendant pled guilty to violation of causing injury to children, and his expressed desire to change did not manifest itself into positive steps toward treatment and rehabilitation, district court's decision to deny probation was proper. *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

Where 34 year old defendant pled guilty to causing injury to a child under subsection (1) of this section, and in the record, the presentence investigation report and transcript of the sentencing hearing defendant was shown to be a person who had rejected discipline, had poor work habits, had been involved in sexual misconduct prior to being charged in this case, was reported in psychological evaluation to have a high risk of re-offense, particularly because of his resistance to treatment for his sexual misconduct, and to be evasive and less than honest, and the psychology staff voted to recommend incarceration rather than probation, judge's denial of probation was not erroneous. *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

Sentence.

The court did not abuse its discretion in refusing to suspend a six-month sentence for violation of this section, where the violation constituted neglect resulting in a child's death, and due consideration was given to the criteria of § 19-2521 governing the criteria for probation. *State v. Staten*, 114 Idaho 925, 762 P.2d 838 (Ct. App. 1988).

Where record of defendant who pled guilty to violation to causing injury to a child reflected that defendant's inappropriate sexual behavior toward children had escalated over time, and there was no evidence that any reformatory treatment had ever been pursued and under the sentence imposed, defendant would be punished and would be forced to contemplate the seriousness of his actions with the end of deterring him in the future, and society would be safe from his predation on society's most innocent members, sentence of a total of ten years with fixed term of seven years sentence was not excessive. *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

A unified sentence of three years fixed followed by an indeterminate period of three years for felony injury to a child was not an abuse of discretion where defendant a mother of four children and late into her third trimes-

ter of pregnancy, habitually used cocaine, her son was born addicted to the drug, and, when asked by the investigator why, on the particular day of the infant's death, she failed to feed the baby or to pick him up for approximately a ten-hour span of time, defendant/mother "belligerently answered, 'Well, I just didn't.'" and defendant's statements regarding her use of cocaine and the events that transpired surrounding the death of her son varied significantly among the various reports of the investigating officers. *State v. Reyes*, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992).

Where defendant was convicted of permitting injury to a child, a unified nine-year sentence, with three years as the minimum period of confinement, was reasonable. *State v. Hostetler*, 124 Idaho 191, 858 P.2d 331 (Ct. App. 1993).

Unified sentence of twenty years with a ten-year minimum period of confinement for felony injury to a child was not unreasonable, where defendant had been previously found guilty of child abuse of another child, and had a criminal record beginning at age thirteen. *State v. Hassett*, 124 Idaho 357, 859 P.2d 955 (Ct. App. 1993).

Although the sentencing court's reliance on information outside the record may have been improper, the procedure used did not rise to the level of a deprivation of due process that would call for examination on appeal despite the lack of an objection below. *State v. Newsom*, 135 Idaho 89, 14 P.3d 1083 (Ct. App. 2000).

"Willfully Permit."

The term "willfully," as used in the context of "willfully permit," has a broader meaning than the standard language of § 18-101; therefore, the term "willfully," when describing the mens rea necessary for a conviction under the "willfully permit" prong of this section, requires more than a purpose or willingness to commit the act or make the omission referred to. The state was required to show that defendant had knowledge of the

consequences that his son would suffer "unjustifiable physical pain or mental suffering" as a result of his omission. *State v. Young*, 138 Idaho 370, 64 P.3d 296 (2002).

The "willfulness" element of the endangerment offense, Idaho Code § 18-1501(1), applies not merely to the act of placing a child in a particular situation but also to the endangerment, and this does not require that defendant intends to harm the child, but it does require that defendant place the child in a potentially harmful situation with knowledge of the danger. *State v. Halbesleben*, — Idaho —, 75 P.3d 219 (Ct. App. 2003).

Collateral References. 43 C.J.S., Infants, §§ 110—124.

Constitutionality of anti-cigarette legislation. 20 A.L.R. 926.

Billiard rooms, regulations as to minors in. 20 A.L.R. 1487; 29 A.L.R. 41; 53 A.L.R. 149; 72 A.L.R. 1339.

School, prosecution under laws as to truants and delinquent or neglected children where child is expelled from, for refusal to take oath of allegiance, to salute flag, or to participate in other ritual of a patriotic character. 141 A.L.R. 1034; 147 A.L.R. 698.

Divorce court's acquisition of jurisdiction over custody and maintenance of child as excluding jurisdiction of juvenile court. 146 A.L.R. 1171.

Records or evidence in juvenile court proceedings, constitutionality, construction and application of statutory provision against use in evidence in any other case. 147 A.L.R. 443.

Criminal neglect by failure to provide medical attention. 12 A.L.R.2d 1047.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 A.L.R.2d 396.

Ignorance or mistake regarding purchaser's age as affecting criminal offense of selling liquor to minor (or person under specified age). 12 A.L.R.3d 991.

What constitutes violation of enactment prohibiting sale of intoxicating liquor to minor. 89 A.L.R.3d 1256.

18-1502. Beer, wine or other alcohol age violations — Fines. —

(a) Whenever a person is in violation, on the basis of his age, of any federal, state, or municipal law or ordinance pertaining to the use, possession, procurement, or attempted procurement, or dispensing of any beer, wine or other alcoholic beverage product, the violation shall constitute a misdemeanor.

(b) Every person convicted of a misdemeanor under this section shall be punished by a fine of not more than one thousand dollars (\$1,000). The second conviction under this section shall be punished by a fine of not more than two thousand dollars (\$2,000), or up to thirty (30) days in jail or both. The third and subsequent conviction under this section shall be punished by

a fine of not more than three thousand dollars (\$3,000), or up to sixty (60) days in jail or both.

(c) A conviction under this section shall not be used or considered in any manner for purposes of motor vehicle insurance.

(d) Whenever a person pleads guilty or is found guilty of violating any law pertaining to the possession, use, procurement, attempted procurement or dispensing of any beer, wine, or other alcoholic beverage, and such person was under twenty-one (21) years of age at the time of such violation, then in addition to the penalty provided in subsection (b) of this section:

(1) The court shall suspend the person's driving privileges for a period of not more than one (1) year. The person may request restricted driving privileges during the period of suspension, which the court may allow, if the person shows by a preponderance of the evidence that driving privileges are necessary as deemed appropriate by the court.

(2) If the person's driving privileges have been previously suspended under this section, the court shall suspend the person's driving privileges for a period of not more than two (2) years. The person may request restricted driving privileges during the period of suspension, which the court may allow, if the person shows by a preponderance of the evidence that driving privileges are necessary as deemed appropriate by the court.

(3) The person shall surrender his license or permit to the court.

(4) The court shall notify the motor vehicle division of the Idaho transportation department of all orders of suspension it issues pursuant to this section.

(5) The court, in its discretion, may also order the person to undergo and complete an alcohol evaluation and to complete an alcohol treatment or education program in the same manner that persons sentenced pursuant to section 18-8005, Idaho Code, are required to undergo and complete. [I.C., § 18-1502, as added by 1981, ch. 222, § 2, p. 412; am. 1982, ch. 110, § 3, p. 311; am. 1983, ch. 266, § 1, p. 697; am. 1987, ch. 212, § 1, p. 448; am. 1989, ch. 88, § 65, p. 151; am. 1989, ch. 155, § 10, p. 371; am. 1990, ch. 280, § 1, p. 785; am. 1994, ch. 133, § 1, p. 305; am. 1998, ch. 312, § 1, p. 1033.]

Compiler's notes. Former § 18-1502 (I.C., § 18-1502, as added by 1972, ch. 336, § 1, p. 844) was repealed by S.L. 1981, ch. 222, § 1.

Sections 2 and 4 of S.L. 1982, ch. 110 are compiled as §§ 16-1804 (now § 20-506) and 23-612, respectively.

Section 2 of S.L. 1987, ch. 212 is compiled as § 23-312.

Sections 64 and 66 of S.L. 1989, ch. 88 are compiled as §§ 18-8007 and 31-2202, respectively.

Sections 9 and 11 of S.L. 1989, ch. 155 are compiled as §§ 16-1826 to 16-1850 (now 20-504, 20-531, 20-532, 20-533, 16-1830 to 16-1835 (repealed), 20-534 to 20-539, 16-1842 to 16-1843 (repealed), 20-540 to 20-542, 16-1845 to 16-1846 (repealed), and 16-1850 (repealed)) and 18-1510, respectively.

Section 16 of S.L. 1987, ch. 212 declared an emergency. Approved March 31, 1987.

Section 70 of S.L. 1989, ch. 88 as amended by § 1 of S.L. 1990, ch. 45 provided that the act would become effective July 1, 1990.

Section 21 of S.L. 1989, ch. 155 provided that the act should be in full force and effect on and after January 15, 1990.

Sec. to sec. ref. This section is referred to in §§ 23-604, 23-612, 23-949, 49-307 and 49-328.

Opinions of Attorney General. Because of the lack of a rational relationship between driving or driving privileges and the state's interests in prohibiting a minor's non-traffic possession, procurement, or use of an alcoholic beverage, subsection (c) of this section requiring suspension of driving privileges for teenagers convicted of liquor offenses is un-

constitutional on equal protection grounds and probably on substantive due process grounds as well. OAG 84-5.

18-1502A. Sale of tobacco to a minor — Possession by a minor — Fines. [Repealed.]

Compiler's notes. This section which comprised I.C., § 18-1502A, as added by 1981, ch. 222, § 3, p. 412; am. 1982, ch. 328, § 1, p. 833; am. 1994, ch. 133, § 2, p. 305 was re-

pealed by S.L. 1997, ch. 278, § 2, effective March 21, 1997. For present law see §§ 39-5701 — 39-5708.

18-1502B. Possession of inhalants by minors. — Whenever a person under the age of eighteen (18) years is in possession and uses an aerosol spray product or other inhalant, that is not used pursuant to the instructions or prescription of a licensed health care provider or that is not used pursuant to the manufacturer's label instructions, for the purpose of becoming under the influence of such substance; such person shall be guilty of a misdemeanor, and upon conviction, may be punished by a fine not in excess of three hundred dollars (\$300), or by thirty (30) days in a juvenile detention facility or by both or may be subject to the provisions of chapter 5, title 20, Idaho Code.

For the purposes of this section, the term "inhalant" means any glue, cement or other substance containing one (1) or more of the following chemical compounds: acetone and acetate, amyl nitrite or amyl nitrate or their isomers, benzene, butyl alcohol, butyl nitrite, butyl nitrate or their isomers, ethyl alcohol, ethyl nitrite or ethyl nitrate, ethylene dichloride, isobutyl alcohol, methyl alcohol, methyl ethyl ketone, n-propyl alcohol, pentachlorophenol, petroleum ether, propyl nitrite or propyl nitrate or their isomers, toluene or xylene or other chemical substance capable of causing a condition of intoxication, inebriation, excitement, stupefaction or the dulling of the brain or nervous system as a result of the inhalation of the fumes or vapors of such chemical substance. [I.C., § 18-1502B, as added by 1993, ch. 154, § 1, p. 390; am. 2004, ch. 23, § 4, p. 25.]

Compiler's notes. Section 2 of S.L. 1993, ch. 154 is compiled as § 20-505.

compiled as §§ 18-216 and 33-207, respectively.

Sections 3 and 5 of S.L. 2004, ch. 23 are

18-1502C. Possession of marijuana or drug paraphernalia by a minor — Use of controlled substances — Fines. — (1) Any person under eighteen (18) years of age who shall have in his possession any marijuana as defined in section 37-2701(s), Idaho Code, which would constitute a misdemeanor for an adult so charged, or who shall have in his possession any drug paraphernalia as defined in section 37-2701(n), Idaho Code, or who shall unlawfully use or be under the influence of controlled substances in violation of the provisions of section 37-2732C, Idaho Code, shall be guilty of a misdemeanor, and upon conviction, may be punished by a fine not in excess of one thousand dollars (\$1,000) or by ninety (90) days in a juvenile detention facility or by both or may be subject to the provisions of chapter 5, title 20, Idaho Code. If the juvenile is adjudicated under the

provisions of chapter 5, title 20, Idaho Code, for a violation of this section he shall be sentenced in accordance with the provisions of chapter 5, title 20, Idaho Code. The juvenile shall be adjudicated under chapter 5, title 20, Idaho Code, for a violation of section 37-2732C, Idaho Code, unless the court finds that adjudication under chapter 5, title 20, Idaho Code, is not appropriate in the circumstances.

(2) A conviction under this section shall not be used as a factor or considered in any manner for the purpose of establishing rates of motor vehicle insurance charged by a casualty insurer, nor shall such conviction be grounds for nonrenewal of any insurance policy as provided in section 41-2507, Idaho Code.

(3) Any person who pleads guilty or is found guilty of possession of marijuana pursuant to this section, or any person under eighteen (18) years of age who pleads guilty or is found guilty of a violation of section 37-2732C, Idaho Code, then in addition to the penalty provided in subsection (1) of this section:

(a) The court shall suspend the person's driving privileges for a period of not more than one (1) year. The person may request restricted driving privileges during the period of suspension, which the court may allow, if the person shows by a preponderance of the evidence that driving privileges are necessary as deemed appropriate by the court.

(b) If the person's driving privileges have been previously suspended under this section, the court shall suspend the person's driving privileges for a period of not more than two (2) years. The person may request restricted driving privileges during the period of suspension, which the court may allow, if the person shows by a preponderance of the evidence that driving privileges are necessary as deemed appropriate by the court.

(c) The person shall surrender his license or permit to the court.

(d) The court shall notify the motor vehicle division of the Idaho transportation department of all orders of suspension it issues pursuant to this section.

(4) The court, in its discretion, may also order the person convicted of possession of marijuana under subsection (1) of this section, or a person under eighteen (18) years of age who has been convicted of using or being under the influence of a controlled substance in violation of section 37-2732C, Idaho Code, to undergo and complete a substance abuse evaluation and to complete a drug treatment program, as provided in section 37-2738, Idaho Code. [I.C., § 18-1502C, as added by 1994, ch. 414, § 1, p. 1302; am. 1995, ch. 361, § 1, p. 1264; am. 1996, ch. 261, § 2, p. 857; am. 1999, ch. 388, § 2, p. 1083; am. 2002, ch. 184, § 1, p. 535; am. 2003, ch. 285, § 2, p. 770.]

Compiler's notes. Section 2 of S.L. 1994, ch. 414 is compiled as § 20-505.

Sections 1 and 3 of S.L. 1996, ch. 261 are compiled as §§ 37-2732C and 20-505, respectively.

Section 1 of S.L. 1999, ch. 388 is compiled as § 20-505.

Section 1 of S.L. 2003, ch. 285 is compiled as § 37-2738.

Section 6 of S.L. 1996, ch. 261 provided that §§ 1 — 4 of the act should become effective July 1, 1996 and that § 5 should become effective March 28, 1997.

18-1503, 18-1504. Tobacco vending machine accessible to minors a misdemeanor. [Repealed.]

Compiler's notes. These sections which comprised I.C., §§ 18-1503 and 18-1504, as added by 1972, ch. 336, § 1, p. 844 were repealed by S.L. 1997, ch. 278, § 2, effective March 21, 1997. For present law see §§ 39-5701 — 39-5708.

Other former sections 18-1503 — 18-1505, which comprised R.S., R.C. & C.L. § 6875;

I.C.A., § 17-2003; S.L. 1943, ch. 41, §§ 1, 2, p. 83; am. S.L. 1963, ch. 38, § 1, p. 186 were repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972. Further §§ 18-1503 — 18-1505 which comprised §§ 18-1503 — 18-1505 as added by 1971, ch. 143, § 1, were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

18-1505. Abuse, exploitation or neglect of a vulnerable adult. —

(1) Any person who abuses, exploits or neglects a vulnerable adult is guilty of a misdemeanor.

(2) As used in this section:

(a) "Abuse" means the intentional or negligent infliction of physical pain, injury or mental injury.

(b) "Caretaker" means any individual or institution that is responsible by relationship, contract or court order to provide food, shelter or clothing, medical or other life-sustaining necessities to a vulnerable adult.

(c) "Exploitation" means an action which may include, but is not limited to, the misuse of a vulnerable adult's funds, property or resources by another person for profit or advantage.

(d) "Neglect" means failure of a caretaker to provide food, clothing, shelter or medical care to a vulnerable adult, in such a manner as to jeopardize the life, health and safety of the vulnerable adult.

(e) "Vulnerable adult" means a person eighteen (18) years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person.

(3) Nothing in this section shall be construed to mean a person is abused, neglected or exploited for the sole reason he is relying upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination; nor shall the provisions of this section be construed to require any medical care or treatment in contravention of the stated or implied objection of such a person. [I.C., § 18-1505, as added by 1994, ch. 136, § 3, p. 308.]

Compiler's notes. Former § 18-1505, which comprised R.S., R.C., & C.L., § 6875; C.S., § 8327; I.C.A., § 17-2003, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A second former section which comprised I.C., § 18-1505 as added by S.L. 1971, ch. 143, § 1 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

A third former § 18-1505, which comprised I.C., § 18-1505, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 136, § 2, effective July 1, 1994.

Section 1 of S.L. 1994, ch. 136 amended the heading of Chapter 15, Title 18.

Sec. to sec. ref. This section is referred to in §§ 9-340B, 18-1505A and 39-5310.

18-1505A. Abandoning a vulnerable adult. — Any person who abandons a vulnerable adult, as that term is defined in section 18-1505, Idaho Code, in deliberate disregard of the vulnerable adult's safety or

welfare, regardless of whether the vulnerable adult suffered physical harm from the act of abandonment, shall be guilty of a felony and shall be imprisoned in the state prison for a period not in excess of five (5) years, or by a fine not exceeding five thousand dollars (\$5,000), or by both such fine and imprisonment. It shall not be a defense to prosecution under the provisions of this section that the perpetrator lacked the financial ability or means to provide food, clothing, shelter or medical care reasonably necessary to sustain the life and health of a vulnerable adult.

As used in this section “abandon” means the desertion or willful forsaking of a vulnerable adult by any individual, caretaker as defined by subsection (2)(b) of section 18-1505, Idaho Code, or entity which has assumed responsibility for the care of the vulnerable adult by contract, receipt of payment of care, any relationship arising from blood or marriage wherein the vulnerable adult has become the dependent of another or by order of a court of competent jurisdiction; provided that abandon shall not mean the termination of services to a vulnerable adult by a physician licensed under chapter 18, title 54, Idaho Code, or anyone under his direct supervision, where the physician determines, in the exercise of his professional judgment, that termination of such services is in the best interests of the patient. [I.C., § 18-1505A, as added by 1993, ch. 179, § 1, p. 460; am. 1994, ch. 136, § 4, p. 308.]

Abandonment Found.

Trial court properly convicted defendant son of abandoning a vulnerable adult where defendant's aged and sick mother suffered a stroke at home, but he did not call the paramedics for several days; when he did finally call for medical assistance, his unresponsive mother was transported to the emergency

room and doctors found her to be in appalling condition with bed sores and maggots, suffering from dehydration and malnutrition. Investigating officers found the residence to be in grave disrepair, with no running water. *State v. Folsom*, — Idaho —, 84 P.3d 563 (Ct. App. 2003).

18-1506. Sexual abuse of a child under the age of sixteen years. —

(1) It is a felony for any person eighteen (18) years of age or older, with the intent to gratify the lust, passions, or sexual desire of the actor, minor child or third party, to:

- (a) solicit a minor child under the age of sixteen (16) years to participate in a sexual act, or
- (b) cause or have sexual contact with such minor child, not amounting to lewd conduct as defined in section 18-1508, Idaho Code, or
- (c) make any photographic or electronic recording of such minor child.

(2) For the purposes of this section “solicit” means any written, verbal, or physical act which is intended to communicate to such minor child the desire of the actor or third party to participate in a sexual act or participate in sexual foreplay, by the means of sexual contact, photographing or observing such minor child engaged in sexual contact.

(3) For the purposes of this section “sexual contact” means any physical contact between such minor child and any person, which is caused by the actor, or the actor causing such minor child to have self contact.

(4) Any person guilty of a violation of the provisions of this section shall be imprisoned in the state prison for a period not to exceed fifteen (15) years. [I.C., § 18-1506, as added by 1982, ch. 192, § 1, p. 519; am. 1984, ch. 63, § 1,

p. 112; am. 1987, ch. 178, § 1, p. 354; am. 1988, ch. 329, § 1, p. 991; am. 1992, ch. 145, § 1, p. 438.]

Compiler's notes. A former § 18-1506 which comprised S.L. 1957, ch. 197, § 1, p. 407 was repealed by S.L. 1969, ch. 325, § 11.

Section 2 of S.L. 1984, ch. 63 is compiled as § 18-1508.

Cross ref. Lewd conduct with minor, § 18-1508.

Medical examination of victim, cost paid by law enforcement agency, § [19-5303] 19-5302.

Rape, § 18-6101.

Sec. to sec. ref. This section is referred to in §§ 6-1701, 16-2002, 18-310, 18-8304, 18-8314, 18-8323, 19-402, 19-2520G, 19-2604, 19-5307, 19-5506, 33-1208, 39-1113, and 72-1025.

Cited in: State v. Snapp, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987); Balla v. Idaho State Bd. of Cors., 869 F.2d 461 (9th Cir. 1988); State v. Snow, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991); State v. Joyner, 121 Idaho 376, 825 P.2d 99 (Ct. App. 1992); State v. Alberts, 121 Idaho 204, 824 P.2d 135 (Ct. App. 1991); State v. Hernandez, 122 Idaho 227, 832 P.2d 1162 (Ct. App. 1992); State v. Acevedo, 131 Idaho 513, 960 P.2d 196 (Ct. App. 1998); State v. Mowrey, 134 Idaho 751, 9 P.3d 1217 (2000); State v. Brooke, 134 Idaho 807, 10 P.3d 756 (Ct. App. 2000).

ANALYSIS

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Alibi Defense.

A defendant who has had a close association with a minor over a protracted period of time and who is charged with continuous conduct of abuse will have no practical defense of alibi. State v. Taylor, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

Bail.

In a lewd conduct and sexual abuse of a minor case, where the judge based his decision to revoke the bail on: (1) the seriousness of the two charges, (2) the fact that defendant first denied guilt and intent at his arraignment and then admitted the requisite intent, thereby indicating to the judge some degree of denial, and (3) the judge's “gut feeling” that defendant might flee, the judge did not abuse his discretion by disallowing bail when he accepted defendant's guilty plea. State v. Sabin, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Construction.

Unfortunately, this section and § 18-1508 are poorly written and appear to prohibit overlapping kinds of conduct. Sexual contact that amounts to sexual abuse can conceivably fall into the nebulous category of acts which, under § 18-1508, include but are not limited to the enumerated acts of lewd conduct. State v. Drennon, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994).

In order to convict a defendant of a sexual abuse charge, the State has to prove that the defendant touches the victim's breast and that he does so with the intent to gratify the lust, passions, or sexual desire of the defendant or the minor child. The State is required to prove that a defendant's touching of the victim is sexual, rather than accidental or innocent. State v. Cannady, 137 Idaho 67, 44 P.3d 1122 (2002).

Defenses.

—Consent.

Because the legislature stated it intended to extend the protection offered in this section and § 18-1508 to minors aged sixteen and seventeen when enacting § 18-1508A, and because consent is not a defense to § 18-1508, consent is also not a defense to § 18-1508A. State v. Oar, 129 Idaho 337, 924 P.2d 599 (1996).

Evidence.

On appeal from a conviction of sexual abuse of a child under the age of sixteen, pursuant to this section, the trial court properly allowed testimony by the victim and her twin sister, the defendant's stepdaughters, as to numerous incidents of sexual advances towards both girls, where such testimony was limited to incidents occurring in the preceding one-year period, and where such evidence was relevant to show a common scheme and plan, motive, intent, lustful disposition and opportunity to commit the crime charged. State v.

Maylett, 108 Idaho 671, 701 P.2d 291 (Ct. App. 1985).

At times, expert testimony will tend to show that another witness either is or is not telling the truth and this in and of itself will not render the expert testimony inadmissible; where the testimony of the clinical psychologist was that "a lot of times" children become honest in the court room, and no reference was made to any of the specific children who had testified, his testimony was admissible and relevant. *State v. Snapp*, 110 Idaho 269, 715 P.2d 939 (1986).

There was substantial evidence to support the defendant's convictions on two counts of sexual abuse where the evidence showed that he had a trampoline in his backyard which attracted numerous children, that he gave treats and small amounts of money to children, took some of them for drives in his car, on sleds and in his four-wheeler, allowing them to sit on his lap and steer, where he had a large quantity of pornographic magazines, books and catalogues, and where several children testified that he had touched them inappropriately. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (Ct. App. 1999).

—Age of Defendant.

In prosecution under this section where no direct evidence of defendant's age was presented, judge's comments in ruling upon defendant's motion for acquittal that defendant appeared to be well over eighteen years old led to the conclusion that defendant's outward appearance constituted some evidence that indicated that he appeared to be well above eighteen years old and in addition where victim testified that perpetrator had gray hair together with his identification of defendant constituted circumstantial evidence that defendant was not a minor and such evidence was sufficient to allow rational jurors to conclude beyond a reasonable doubt that defendant was not less than eighteen years of age. *State v. Willard*, 129 Idaho 827, 933 P.2d 116 (Ct. App. 1997).

A proper analysis of whether there was sufficient circumstantial evidence of the defendant's age entailed firstly a determination of whether the record revealed that his physical appearance was such that a rational jury could find that the age element was satisfied solely from observation of the defendant and, if not, whether there was other circumstantial evidence adequate to support the jury's finding that the defendant was of the requisite age. *State v. Espinoza*, 133 Idaho 618, 990 P.2d 1229 (Ct. App. 1999).

Where there was nothing in the record to show that the defendant's physical appearance, standing alone, could sustain a conclusion that he was of age, but where there was

testimony by both the defendant and other witnesses that he purchased beer, it was permissible for the jury to take into account the common knowledge of the legal age for the purchase and consumption of alcohol. *State v. Espinoza*, 133 Idaho 618, 990 P.2d 1229 (Ct. App. 1999).

—Testimony of Prior Victims.

The district court correctly applied the Rules of Evidence when it allowed three women, who were not victims in a case, to testify regarding their accusations of defendant's sexual misbehavior with them when they were minors, where the trial court weighed the proffered testimony and determined that it would be more helpful to the jury in determining the credibility of the victim's testimony than it would be prejudicial to defendant. *State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993).

Because their testimony was relevant to show that defendant had not complied with the terms of probation requiring him to give a comprehensive and accurate sexual history, district court did not err in admitting testimony at probation revocation hearing of minor children who were the subjects of dismissed charges pursuant to Rule 11 plea agreement; order revoking withheld judgment and imposing minimum fixed term of five years for sexual abuse of a minor affirmed. *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).

—Testimony of Victim.

In a criminal action for sexual abuse, in which the victim testified that her uncle came to her bed on three separate occasions, each time fondling either her buttocks or her breast, her testimony was corroborated by her brother, and the defendant's statements to investigating officers were inconsistent, a rational jury could infer from this evidence that the defendant had sexual contact with his niece or had physical contact with the intent to gratify sexual desire. *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996).

Where in prosecution under this section the victim testified "Fourteen" in answer to the question as to how old he was, there was sufficient direct evidence that victim was a "minor child under the age of sixteen years". *State v. Willard*, 129 Idaho 827, 933 P.2d 116 (Ct. App. 1997).

Guilty Plea.

Where defendant in a lewd conduct and sexual abuse of a minor case initially denied the intent element of lewd conduct before the court accepted his plea of guilty, and then after a ten-minute recess, defendant admitted to the intent alleged, the trial court did not err in accepting defendant's guilty plea. *State*

v. Sabin, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Because of the grant of immunity accorded defendant pursuant to his Rule 11 plea agreement, defendant was not denied his Fifth Amendment right against self-incrimination by being required in treatment to admit to his sexual activities with the minor children who were victims of the charges that were dismissed pursuant to his Rule 11 plea agreement; order revoking withheld judgment and imposing minimum fixed term of five years for sexual abuse of a minor affirmed. *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).

Included Offenses.

Violation of this section is a lesser included offense when an individual is charged with violation of § 18-1508. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

Jury Instructions.

—Circumstantial Evidence.

The district court did not err when it refused to give defendant's requested jury instruction regarding circumstantial evidence susceptible of two constructions or interpretations where the state's case alleging sexual abuse of a minor did not rest entirely upon the circumstantial evidence. *State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993).

Other Offense.

Where defendant was tried for lewd conduct based on penile penetration, but acquitted, then he was retried on a different charge, which was comprised of different elements and required different facts than the lewd conduct charge, he failed to show that he was retried on the lewd conduct offense. *State v. Colwell*, 127 Idaho 854, 908 P.2d 156 (Ct. App. 1995).

Psychological Evaluation.

The judge erred in a case involving lewd conduct and sexual abuse of a minor by not ordering a psychological evaluation as part of the presentence investigation or through retained jurisdiction, because, although a psychological evaluation is not required in every case where the court orders a presentence investigation, in this case, defendant had a solid work history, was a family man, and had no prior criminal record. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Search Warrant.

A magistrate could have properly and reasonably relied on a common-sense reading of a police officer's affidavit, and had a substantial basis for finding that, contained within the items seized by the police, there was evidence that the defendant made photographic recordings of a minor child with the

intent to gratify the lust, passions, or sexual desire of the actor, minor child, or a third party. *State v. Weimer*, 133 Idaho 442, 988 P.2d 216 (Ct. App. 1999).

Sentence.

Where the record indicated that the defendant had damaged his family, perhaps beyond repair, and the trial court considered the likelihood of rehabilitation, the seriousness of the crime, the defendant's prior criminal record, and the fact that the defendant had consistently refused to admit the gravity of his offense or even acknowledge that he had sexually abused his three children, a ten-year indeterminate sentence for three counts of sexual abuse of a child under 16 was within the statutory maximum, and there was no abuse of discretion. *State v. Snapp*, 110 Idaho 269, 715 P.2d 939 (1986).

Where, in prosecution for sexual abuse of a child, the presentence report disclosed that the defendant sexually abused his daughter on numerous occasions, that he had a long history of antisocial behavior, including substance and alcohol abuse and indicated the defendant had several prior misdemeanor convictions and a felony conviction for which he received probation, and the defendant continued to deny certain incidents of prior sexual misconduct which had been admitted to the police and to the psychologist, the district judge did not err in finding the defendant to be a continuing danger to society, and five-year fixed term was strict, but not unreasonable, in light of this finding. *State v. Beebe*, 113 Idaho 977, 751 P.2d 673 (Ct. App. 1988).

Where the record did not show that the defendant could never be safely returned to society on parole, the fixed life sentence for convictions of first degree burglary and sexual abuse of a child was inappropriate. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

A sentence of 12 years, with a four-year minimum period of confinement, for a defendant convicted of sexual abuse of a child under 16 years of age, was not excessive where defendant had stated he touched his stepdaughter's breasts because he disliked her; the defendant lacked genuine remorse and the district judge felt that the defendant exhibited the tendency to use threats, intimidation, fear and terror to get his way or to push people around. *State v. Jones*, 118 Idaho 720, 800 P.2d 116 (Ct. App. 1990).

A fixed, five-year sentence on a sexual abuse charge and an indeterminate life sentence with a five-year minimum period of incarceration on a lewd conduct charge, which were to run concurrently, were not excessive nor an abuse of discretion even though the court declined to follow the treatment recommendations of the evaluating psychologists.

State v. Bartlett, 118 Idaho 722, 800 P.2d 118 (Ct. App. 1990).

Where 21-year-old defendant who was convicted of two charges of lewd conduct with a minor, and one charge of sexually abusing a child under the age of 16, had a troubled past as evidenced by (1) the fact that at an early age he was exposed to alcohol and drugs in an unstable family, (2) his admission to having a drinking problem, which sometimes resulted in violent behavior, (3) prior charges which included petit larceny, sodomy, and assault, (4) prior unsuccessful sentences of probation and (5) the fact that he had been given several opportunities to attend treatment facilities and all attempts to rehabilitate him had been unsuccessful, sentences of a fixed term of 20 years, plus an indeterminate term of 10 years on each of two charges of lewd conduct with a minor and in addition, a fixed term of ten years plus an indeterminate time term of five years for one charge of sexually abusing a child under the age of 16 were reasonable. State v. Waddoups, 119 Idaho 363, 806 P.2d 456 (Ct. App. 1991).

The court did not abuse its discretion by denying defendant's I.C.R. 35 motion for reduction of sentence because although defendant does not have a prior criminal record, he has a history of sexual misconduct with young males. State v. Homeier, 120 Idaho 648, 818 P.2d 352 (Ct. App. 1991).

A unified sentence of ten years with a minimum period of confinement of three years for sexual abuse of a child under the age of 16 was not an abuse of discretion where defendant was charged with engaging in sexual activity with his stepdaughter, age 13, by fondling her breasts while she was sleeping. This case was not defendant's first involvement with the criminal justice system; in 1980, he purportedly engaged in sexual intercourse with another teen-aged stepdaughter, but formal charges were not filed and defendant had been married six times and five of these marriages were to teenage females. State v. Patterson, 121 Idaho 789, 828 P.2d 352 (Ct. App. 1992).

The district court's imposition of consecutive terms of confinement on defendant, who pled guilty to two counts of sexual abuse of a minor under the age of sixteen did not constitute an excessive sentence. State v. Spencer, 13 Idaho 728, 843 P.2d 163 (Ct. App. 1992).

Two concurrent unified sentences of 15 years, with a minimum period of incarceration of five years for two counts of sexual abuse of a child under 16 was not an abuse of sentencing discretion even though the court acknowledged that defendant had exhibited a long-standing need for some form of sex offender therapy. State v. Keller, 123 Idaho 187, 845 P.2d 1220 (Ct. App. 1993).

A unified sentence of five years' fixed and

five years' indeterminate for sexual abuse of a child was reasonable; and, the district court's decision to deny a motion for leniency did not constitute an abuse of discretion where the record revealed that the district court considered the pre-sentence investigation report, the psychological report, and the court record. State v. Lowells, 123 Idaho 171, 845 P.2d 589 (Ct. App. 1993).

Sentence of ten and one-half years, with a minimum term of confinement of three and one-half years for defendant's sexual abuse of his daughter was affirmed, where defendant admitted to fondling his daughter over a ten year period, and had previously received a withheld judgment for sexual abuse of his step-daughter. State v. Hastings, 124 Idaho 404, 860 P.2d 20 (Ct. App. 1993).

Sentence of eight years' incarceration with a three year determinate term was not an abuse of discretion where defendant sexually abused nine year old girl by touching and fondling her chest and buttocks, made lewd remarks to victim and exhibited movies depicting nude females in her presence. State v. Beck, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

Unified life sentence with a minimum term of ten years' confinement for lewd and lascivious conduct with a minor conviction and a determinate sentence of five years for sexual abuse of a minor conviction were not unreasonable and were affirmed where evidence showed an undue risk that defendant would commit other, similar crimes and lesser sentences would depreciate the seriousness of the crimes. State v. Roberts, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also State v. Roberts, 129 Idaho 194, 923 P.2d 439 (1996), cert. denied, 519 U.S. 1118, 117 S. Ct. 964, 136 L. Ed. 2d 849 (1997).

Sentence of defendant on plea of guilty to one count of sexual abuse of a minor of ten years, with minimum period of confinement of five years, was not an abuse of sentencing court's discretion given defendant's adamant denial of wrongdoing, failure to respond to treatment and high risk to reoffend. State v. Jones, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).

In prosecution for soliciting a minor under the age of sixteen years to participate in sexual acts, sentence of a unified five and one-half years term of incarceration with two-year minimum term where court retained jurisdiction to allow a period for evaluation of defendant's suitability for probation was not an abuse of discretion where although defendant had no prior criminal record there was evidence that this was not the first instance of defendant's inappropriate conduct with children. State v. Willard, 129 Idaho 827, 933 P.2d 116 (Ct. App. 1997).

—Probation Revocation.

Defendant's Alford plea to one count of sexual abuse of a minor did not exempt him from completing his probation, including compliance with the requirement of full disclosure of his sexual history deemed essential to successful participation in sexual abuse counseling and rehabilitation; district court did not abuse its discretion in finding that he had violated his probation as a basis for revoking defendant's probation; order revoking withheld judgment and imposing minimum fixed term of five years for sexual abuse of a minor affirmed. *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996).

“Sexual Abuse.”

Where charges of lewd conduct with a minor were dismissed upon conditions set out in an agreement between defendant and victim's mother and one of the conditions provided that if defendant sexually abused victim again, the state could take legal action “under the Child Protective Act and/or appropriate criminal statutes,” the court properly applied the definition of “sexual abuse” found in § 16-1602, rather than the definition contained in this section, to the agreement. *State v. Claxton*, 128 Idaho 782, 918 P.2d 1227 (Ct. App. 1996).

Sufficiency of Information.

In child sexual abuse cases involving a continuous course of sexual abuse, and evidence of frequent, secretive offenses over a period of time, credibility, not alibi, is the only issue, and detailed specificity in the information as to the times of the offenses is not required. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

The state chose to charge defendant with one count of sexual abuse that was alleged to have occurred sometime between March and

September, 1988; therefore where there was testimony that the adopted daughter and one or more of her siblings were in defendant's home frequently on weekend visits during this period of time, the state could not have pleaded the alleged acts with any more particularity, and the court held that the time stated in the information provided defendant with sufficient notice of the charges brought against him. *State v. Marks*, 120 Idaho 727, 819 P.2d 581 (Ct. App. 1991).

Where state's evidence showed that adopted daughter had been sexually abused by defendant while she was seven years old, and adopted daughter was seven years old from January 29, 1988, to January 28, 1989, but the information recited that the abuse occurred between March and September, 1988, only the month of February 1988 was excluded from the information, and omission of only the month of February from the information was not a material variance from the proof offered at trial. *State v. Marks*, 120 Idaho 727, 819 P.2d 581 (Ct. App. 1991).

Where court's instructions allowed jury to find defendant not guilty of lewd conduct with a minor, but guilty of sexual abuse of a minor based upon proof of facts different from those alleged in the information for the lewd conduct charge, case was vacated and remanded. *State v. Colwell*, 124 Idaho 560, 861 P.2d 1225 (Ct. App. 1993).

Trial Procedure.

—Addressing Child Victim.

The trial court did not commit error by addressing a child abuse victim by her first name where counsel for defendant used the victim's first name throughout the proceedings, as did the state. *State v. Larsen*, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993).

18-1506A. Ritualized abuse of a child — Exclusions — Penalties

—Definition. — (1) A person is guilty of a felony when he commits any of the following acts with, upon, or in the presence of a child as part of a ceremony, rite or any similar observance:

- (a) Actually or in simulation, tortures, mutilates or sacrifices any warm-blooded animal or human being;
- (b) Forces ingestion, injection or other application of any narcotic, drug, hallucinogen or anaesthetic for the purpose of dulling sensitivity, cognition, recollection of, or resistance to any criminal activity;
- (c) Forces ingestion, or external application, of human or animal urine, feces, flesh, blood, bones, body secretions, nonprescribed drugs or chemical compounds;
- (d) Involves the child in a mock, unauthorized or unlawful marriage ceremony with another person or representation of any force or diety [deity], followed by sexual contact with the child;

- (e) Places a living child into a coffin or open grave containing a human corpse or remains;
- (f) Threatens death or serious harm to a child, his parents, family, pets or friends which instills a well-founded fear in the child that the threat will be carried out; or
- (g) Unlawfully dissects, mutilates, or incinerates a human corpse.
- (2) The provisions of this section shall not be construed to apply to:
 - (a) Lawful agricultural, animal husbandry, food preparation or wild game hunting and fishing practices and specifically the branding or identification of livestock;
 - (b) The lawful medical practice of circumcision or any ceremony related thereto; or
 - (c) Any state or federally approved, licensed or funded research project.
- (3) The penalty upon conviction of a first offense shall be imprisonment in the state prison for a term of not to exceed fifteen (15) years. Upon conviction of a second or subsequent offense, the penalty shall be for a term not more than life imprisonment.
- (4) For the purposes of this section, "child" means any person under eighteen (18) years of age. [I.C., § 18-1506A, as added by 1990, ch. 210, § 1, p. 467.]

Compiler's notes. The bracketed word "deity," contained in subdivision (1)(d), was added by the compiler.

Section 2 of S.L. 1990, ch. 210 is compiled as § 18-5003.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-8304, 18-8314, 19-402, 19-5307, 20-525A, 33-1208 and 39-1113.

18-1507. Sexual exploitation of a child. — (1) The legislature hereby finds and declares that the commercial sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen (18) years is incapable of giving informed consent to the use of his or her body for a commercial purpose; and that to protect children from commercial sexual exploitation it is necessary to prohibit the production for trade or commerce of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.

(2) As used in this section, unless the context otherwise requires:

- (a) "Bestiality" means a sexual connection in any manner between a human being and any animal.
- (b) "Child" means a person who is less than eighteen (18) years of age.
- (c) "Commercial purpose" means the intention, objective, anticipation, or expectation of monetary gain or other material consideration, compensation, remuneration, or profit.
- (d) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female), or developing or undeveloped breast area (if the person is a female child), for the purpose of real or simulated overt sexual gratification or stimulation

of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(e) "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human female breasts, or the undeveloped or developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(f) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement, or bestiality.

(g) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female), or developing or undeveloped breast area (if the person is a female child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

(h) "Sadomasochism" means:

1. Real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or
2. The real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(i) "Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(j) "Sexual intercourse" means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal, between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

(k) "Sexually exploitative material" means any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material which depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(3) A person commits sexual exploitation of a child if, for any commercial purpose, he knowingly:

(a) Causes, induces, or permits a child to engage in, or be used for, any explicit sexual conduct; or

(b) Prepares, arranges for, publishes, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, possesses, or distributes any sexually exploitative material.

(4) The possession by any person of three (3) or more identical copies of

any sexually exploitative material shall create a presumption that such possession is for a commercial purpose.

(5) The sexual exploitation of a child is a felony and shall be punishable by imprisonment in the state prison for a period not to exceed fifteen (15) years or by a fine not to exceed twenty-five thousand dollars (\$25,000) or by both such fine and imprisonment.

(6) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable. [I.C., § 18-1507, as added by 1983, ch. 256, § 1, p. 678; am. 1987, ch. 177, § 1, p. 352; am. 1992, ch. 145, § 2, p. 438.]

Compiler's notes. A former § 18-1507 which comprised S.L. 1957, ch. 197, § 2, p. 407; am. 1961, ch. 58, § 1, p. 86 was repealed by S.L. 1969, ch. 325, § 11.

The words in parentheses so appeared in the law as enacted.

Cross ref. Medical examination of victim, cost paid by law enforcement agency, § [19-5303] 19-5302.

Sec. to sec. ref. This section is referred to in §§ 6-1701, 18-310, 18-1507A, 18-1508, 18-1508A, 18-8304, 19-2604, 19-5307, 20-525A, 33-1208, 39-1113 and 72-1025.

Cited in: State v. Mowrey, 134 Idaho 751, 9 P.3d 1217 (2000).

Sexually Exploitative Material.

Because the statute narrowly and specifically defines sexually exploitative material, and because of the lesser constitutional protections afforded this material, officers involved in the search were not required to

make a subjective determination regarding the status of sexually exploitative materials where it was immediately apparent to the officers upon viewing the cover of the book that it contained sexually exploitative material; therefore all three requirements for a valid plain view seizure were met. State v. Claiborne, 120 Idaho 581, 818 P.2d 285 (1991).

It was immediately apparent to the officers searching defendant's home that a book contained sexually exploitative material where the words on the front cover and the words on the back cover alerted officers as to the contents and clearly made it immediately apparent that sexually exploitative material in the form of "Pedophilia . . . Photo Illustrated" would be found inside, and a cursory glance at the inner contents only served to confirm that conviction. State v. Claiborne, 120 Idaho 581, 818 P.2d 285 (1991).

18-1507A. Possession of sexually exploitative material for other than a commercial purpose — Penalty. — (1) It is the policy of the legislature in enacting this section to protect children from the physical and psychological damage caused by their being used in photographic representations of sexual conduct which involves children. It is, therefore, the intent of the legislature to penalize possession of photographic representations of sexual conduct which involves children in order to protect the identity of children who are victimized by involvement in the photographic representations, and to protect children from future involvement in photographic representations of sexual conduct.

(2) Every person who knowingly and willfully has in his possession any sexually exploitative material as defined in section 18-1507, Idaho Code, for other than a commercial purpose, is guilty of a felony, and shall be punished by imprisonment in the state prison for a period not to exceed five (5) years and by a fine not to exceed five thousand dollars (\$5,000). [I.C., § 18-1507A, as added by 1987, ch. 177, § 2, p. 352.]

Sec. to sec. ref. This section is referred to in §§ 18-8304, 19-5506, 33-1208 and 39-1113.

ANALYSIS

Prohibited material.
Search warrant.

Prohibited Material.

Because Idaho has chosen to criminalize the possession of sexually exploitative material, the book in this case achieved the status of prohibited material, because although it may have fallen under the broad definition of "expressive materials," it was at the same

time evidence of the crime of possession of sexually exploitative material, and this changes the traditional obscenity seizure analysis. *State v. Claiborne*, 120 Idaho 581, 818 P.2d 285 (1991).

Search Warrant.

A police officer's descriptions of amateur photographs of young teenage girls which he had observed were sufficient to provide probable cause for the issuance of a search warrant. *State v. Weimer*, 133 Idaho 442, 988 P.2d 216 (Ct. App. 1999).

18-1508. Lewd conduct with minor child under sixteen. — Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life. [I.C., § 18-6607, as added by 1973, ch. 1, § 1, p. 3; am. and redesign. 1984, ch. 63, § 2, p. 112; am. 1992, ch. 145, § 3, p. 438.]

Compiler's notes. This section was formerly compiled as § 18-6607.

Former § 18-6607, which comprised S.L. 1949, ch. 214, § 1, p. 455 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A former § 18-1508 which comprised S.L. 1957, ch. 197, § 3, p. 407 was repealed by S.L. 1969, ch. 325, § 11.

Sections 1 and 3 of S.L. 1984, ch. 63 are compiled as §§ 18-1506 and 19-2520C, respectively.

Section 2 of S.L. 1973, ch. 1 declared an emergency. Approved January 26, 1973.

Cross ref. Injury to children, § 18-1501.

Medical examination of victim, cost paid by law enforcement agency, § [19-5303] 19-5302.

Sexual abuse of child under 16, § 18-1506.

Sec. to sec. ref. This section is referred to in §§ 6-1701, 16-2002, 18-310, 18-1506, 18-8303, 18-8304, 18-8314, 19-402, 19-2520, 19-2520C, 19-2520G, 19-2604, 19-5307, 19-5506, 33-1208, 39-1113 and 72-1025.

Cited in: *Schwartzmiller v. Winters*, 99 Idaho 18, 576 P.2d 1052 (1978); *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985); *Roberts v. State*, 108 Idaho 183, 697 P.2d 1197 (Ct. App. 1985); *State v. Kay*, 108 Idaho 661, 701 P.2d 281 (Ct. App. 1985); *State v. Madrid*, 108 Idaho 736, 702 P.2d 308

(Ct. App. 1985); *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986); *State v. Stanfield*, 112 Idaho 601, 733 P.2d 822 (Ct. App. 1987); *State v. Mader*, 113 Idaho 409, 744 P.2d 137 (Ct. App. 1987); *State v. Shaw*, 115 Idaho 461, 767 P.2d 836 (Ct. App. 1989); *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988); *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), *aff'd*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); *State v. Peltier*, 119 Idaho 14, 803 P.2d 202 (Ct. App. 1990); *State v. Young*, 119 Idaho 430, 807 P.2d 648 (Ct. App. 1991); *State v. Homeier*, 120 Idaho 648, 818 P.2d 352 (Ct. App. 1991); *State v. Allen*, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993); *State v. Saunders*, 124 Idaho 334, 859 P.2d 370 (Ct. App. 1993); *Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995); *State v. McAway*, 127 Idaho 54, 896 P.2d 962 (1995); *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996); *State v. Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct. App. 1996); *State v. Dewey*, 131 Idaho 846, 965 P.2d 206 (Ct. App. 1998); *Manning v. Foster*, 224 F.3d 1129 (9th Cir. 2000); *State v. Mowrey*, 134 Idaho 751, 9 P.3d 1217 (2000); *State v. Button*, 134 Idaho 864, 11 P.3d 483 (Ct. App. 2000); *State v. Bello*, 135 Idaho 442, 19 P.3d 66 (Ct. App. 2001); *Repp v. State*, 136 Idaho 262, 32 P.3d 156 (Ct. App. 2001).

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Bail.

In a lewd conduct and sexual abuse of a minor case, where the judge based his decision to revoke the bail on: (1) the seriousness of the two charges, (2) the fact that defendant first denied guilt and intent at his arraignment and then admitted the requisite intent, thereby indicating to the judge some degree of denial, and (3) the judge's "gut feeling" that defendant might flee, the judge did not abuse his discretion by disallowing bail when he accepted defendant's guilty plea. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Child Protective Act.**—Effect of Decree.**

A collateral estoppel did not arise from the circumstance that the very incident which gave rise to the criminal charge for lewd conduct with a minor had earlier been the subject of a Child Protective Act (CPA) proceeding, notwithstanding that the State was a party to the CPA proceedings which went to a final "judgment," the findings in the CPA

hearing did not bar the criminal prosecution on the charge of lewd and lascivious conduct because a conclusion as to whether a particular incident of abuse took place is not essential to the determination of the child's best interests under the CPA and, unlike a criminal prosecution, a CPA proceeding does not have the effect of placing a defendant in jeopardy. *State v. Powell*, 120 Idaho 707, 819 P.2d 561 (1991).

Competency as Witness.

Although the testimony of a nine year old child revealed a fair measure of embarrassment and lack of poise, and although with respect to the sequence of events her testimony was at times vague, she was unwavering in her testimony that the defendant took the alleged liberties with her and her friend, and thus the decision of the trial judge that the nine year old's indecisiveness went to weight as opposed to admissibility was not in error. *State v. McKenney*, 101 Idaho 149, 609 P.2d 1140 (1980).

Constitutionality.

Because the United States Supreme Court has upheld the language "crime against nature," and because the Idaho court had previously held that "crime against nature" when committed with a minor violates this section, defendant had fair notice that copulation per annum could expose him to criminal charges under this section and the Idaho authorities who charged him and the jury that convicted him had sufficient legal guidelines to fairly judge his acts against the proscriptions of the statute; accordingly, as to two counts of copulation per annum, defendant's imprisonment violated no federal statute or constitutional right. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984) (decision prior to 1984 amendment).

The statutory scheme to protect minors by precluding them from consenting to crimes of their persons in no way denies due process of law. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984) (decision prior to 1984 amendment).

The phrases in this section concerning body parts, lusts, passions, and sexual desires are sufficiently definite, when used in combination, to pass constitutional muster. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984) (decision prior to 1984 amendment).

This section does not violate the Eighth Amendment prescription against cruel and unusual punishment, merely because it allows for a maximum punishment of life imprisonment. *State v. Schwartzmiller*, 107

Idaho 89, 685 P.2d 830 (1984) (decision prior to 1984 amendment).

This section does not impinge on or "chill" any constitutionally protected conduct, substantial or otherwise; moreover, because this section does not by nature fall into the disfavored category of statutes like those regulating vagrancy, and because the Idaho Supreme Court has previously applied the statute to specific conduct, it is also not so vague as to specify "no standard of conduct at all" in any application. *Schwartzmiller v. Gardner*, 752 F.2d 1341 (9th Cir. 1984) (decision under section prior to 1984 amendment).

Because of Idaho precedent holding that the statute defining lewd and lascivious conduct is not unconstitutionally vague, defendant's challenge to the constitutional validity of this section was unavailing. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

Construction.

This section did not incorporate the requirement that the lewd or lascivious conduct be done in an "unnatural manner," thus defendant was subject to punishment under this section where defendant engaged in single "orthodox" act of sexual intercourse with a child under 16. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

The Idaho Supreme Court's analysis in *State v. Wall*, 73 Idaho 142, 248 P.2d 222 (1952) insulates this section from a vagueness attack by someone committing the same acts for which *Wall*, *supra*, was convicted and thus provides a sufficient legal basis for arresting, trying, and convicting citizens for committing the crime against nature with a minor. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984) (decision prior to 1984 amendment).

While § 18-6605 seeks to regulate the morality of an adult populace, this section seeks to provide specific protection for minors. Some, but not all, crimes of sodomy can be charged under this section and similarly, many acts which violate this section do not constitute sodomy; thus, § 18-6605 and this section do not conflict and represent distinct legislative choices in determining the reach of the criminal law. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984) (decision prior to 1984 amendment).

Unfortunately, § 18-1506 and this section are poorly written and appear to prohibit overlapping kinds of conduct. Sexual contact that amounts to sexual abuse can conceivably fall into the nebulous category of acts which, under this section, include but are not limited

to the enumerated acts of lewd conduct. *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994).

The application of § 19-404 operated to extend the limitation period while defendant was out of state even though defendant was not out of state when he committed the offenses of lewd conduct with a minor; it is impermissible to interpret § 19-404 as to require commission of the crime while defendant was out of state, in conjunction with a subsequent absence from the state. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

In order to convict a defendant of a lewd conduct charge, the State has to prove that the defendant touches the victim's vaginal area and that he does so with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the defendant or such minor child. The State is required to prove that a defendant's touching of the victim is sexual, rather than accidental or innocent. *State v. Cannady*, 137 Idaho 67, 44 P.3d 1122 (2002).

Although this section provides a nonexclusive list of prohibited sexual conduct, the act of touching a minor's chest area did not fall within the lewd or lascivious act or acts specifically enumerated in this section and is simply not of the same type of activity as the enumerated acts in the statute; hence, on retrial defendant could not be convicted for violating this section for such contact with the minor victim. *State v. Kavajecz*, — Idaho —, 80 P.3d 1083 (2003).

Corroboration.

In prosecution of defendant for committing a lewd and lascivious act upon the body of his minor female child, where the testimony of the prosecutrix was not found to be contradictory to admitted facts and where prosecutrix' reputation for truth and chastity was not put in issue, the testimony of prosecutrix' brother and sister considered together with evidence of defendant's conduct during the period of time the alleged acts took place was sufficient corroboration of prosecutrix' testimony to sustain defendant's conviction. *State v. Froelich*, 96 Idaho 685, 535 P.2d 658 (1975).

Where defendant's mother testified to seeing defendant in bed with a young girl on the date of the crime, there was sufficient corroboration of prosecutrix' testimony by proof of surrounding circumstances to convict defendant of lewd conduct with a minor under 16. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

The direct eyewitness testimony of the victim's mother can supply the required corroboration. *State v. Tisdell*, 101 Idaho 52, 607 P.2d 1326 (1980).

The requirement of corroboration in sex crime cases is no longer the law in Idaho. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Because there exists no requirement of corroboration at preliminary hearings, corroborative evidence beyond testimony of defendant's daughters was not required at preliminary hearing charging defendant with lewd and lascivious conduct with a minor. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

Defense of Consent.

Because the legislature stated it intended to extend the protection offered in § 18-1506 and this section to minors aged sixteen and seventeen when enacting § 18-1508A and because consent is not a defense to this section, consent is also not a defense to § 18-1508A. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

Defense of Mistake of Fact.

In prosecution for lewd conduct with a minor child under 16 where no evidence was introduced to raise the defense of lack of knowledge on defendant's part as to the victim's age, the trial court did not err in refusing to instruct the jury on the defense of mistake of fact. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976).

Double Jeopardy.

The district court did not err in ruling that defendant's prosecution for the crime of lewd conduct was not barred by double jeopardy because of his previous prosecution for the crime of transferring the HIV virus, § 39-608, which ended in a sua sponte mistrial, where the essential elements of the lewd conduct charge did not constitute a violation of the HIV offense because the State did not produce evidence of defendant's conduct as a knowing carrier of HIV. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

Equal Protection.

This section does not create an irrational classification violative of equal protection by determining as a matter of law that a minor cannot consent, and yet holding that those same minors can form the specific intent to violate the statute; the statute constitutes a valid legislative classification. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984) (decision prior to 1984 amendment).

That defendant's conduct could have been charged under either § 18-6605 or this section did not render his conviction for one a denial of equal protection. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th

Cir. 1984) (decision prior to 1984 amendment).

Evidence.

The trial court in a prosecution for lewd and lascivious conduct with a 14-year-old boy did not err in excluding evidence that the boy had at a previous time charged another person with having committed similar sex acts, even though that person was found not guilty since the present defendant failed to demonstrate to the trial court or to the appellate court that the witness' previous allegations of sexual misconduct against another were false. *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830 (1984).

Evidence of similar acts of sexual misconduct between a defendant and the victim or between the defendant and another witness is admissible for corroboration of the victim's testimony in sex crimes cases. *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830 (1984).

Where, in a prosecution under this section, the defendant's counsel attempted to impeach the credibility of a child witness by emphasizing his failure to report promptly an incident of sexual abuse, the trial court's admission of expert testimony to show that victims of sexual abuse sometimes delay reporting such incidents due to feelings of fear or guilt was not an abuse of discretion. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

The trial judge properly considered the factors of I.R.E. 803(24), and his ruling admitting into evidence the alleged child molestation victim's out-of-court statements to his mother under that exception was correct. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

Since the judge found the victim to be "unavailable," I.R.E. 804(b)(5) would be applicable and would allow the admission of his statements to his mother regarding incidents of sexual molestation. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

In prosecution for rape and lewd and lascivious conduct with a minor, expert opinion regarding the social beliefs, characteristics and mores of the local Hispanic people, particularly the females' desire to protect their husbands or lovers, would not be relevant to show that the victim and her mother might have been trying to protect the actual perpetrator of the crimes charged against the defendant, where the defendant did not produce any evidence reasonably tending to show that another person committed the crimes. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Where, in a prosecution for rape and lewd and lascivious conduct with a minor, a physician did not suggest how, when or by whom a bruise could have been caused, but simply

opined that a bruise observable one day would likely be visible a few days later, there was no error in allowing the testimony. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Where the only evidence of contact between the victim and the defendant went to anal-genital and oral-genital contacts and there was no testimony regarding any other type of touching, evidence in prosecution for lewd conduct with minor or child under age of 16 did not support proposed instructions on lesser included offenses of sexual abuse of child under age of 16 and injury to children with potential of great bodily harm, and battery. The statute pursuant to which defendant was convicted and the jury instruction (§ 18-1508) specifically includes oral-genital contact and anal-genital contact as lewd and lascivious acts. *State v. Fodge*, 121 Idaho 192, 824 P.2d 123 (1992).

Where the trial court found that the statements were reliable because the five-year-old victim of lewd and lascivious conduct made the statements the next morning after returning from visiting her father and concluded that the short length of time between the victim's visit to her father and her bath the next morning indicated that there was not enough time for the victim to fabricate the story, the totality of the circumstances supported the finding of the trial court and the trial court did not abuse its discretion in admitting this evidence pursuant to I.R.E. 803(24). *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

In a prosecution for lewd conduct with a minor, the district court did not err in admitting into evidence certain photographs and a document entitled "And Then There Was James," where the photographs, which depicted scantily clad young men and homosexual acts, fell within the provision of the warrant providing for the search of "memorabilia of victims including photos, clothing, or other personal items," and where the document, which was written in the first person and regarded homosexual acts between the writer and a person who had the "unworried look of a 15-year-old," was properly seized pursuant to the "memorabilia" and "diary" provisions of the warrant. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

Where the only evidence introduced to establish that the charged crime occurred was provided by the victim who described a singular act of genital-genital contact which this section enumerates as lewd conduct and defendant did not describe any other type of act, but denied that any sexual touching had occurred, the issue presented at trial was whether lewd conduct occurred or whether it did not. *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994).

Corroborated testimony of witnesses relat-

ing conversations they had had with minor victim's grandmother, where grandmother related that her boyfriend was "interested in" and "after" the victim, was properly admitted in the trials of the grandmother and her boyfriend for conspiracy to commit lewd conduct with a minor, as such evidence was highly probative and clearly relevant and the probative value was not substantially outweighed by the danger of unfair prejudice, particularly since it did not describe any additional sexual acts. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995); *State v. Castillo*, 127 Idaho 257, 899 P.2d 967 (1995).

—Child's Statement.

There was a sufficient evidentiary foundation upon which the trial court could reasonably determine that child sex abuse victim's out-of-court statement was an excited utterance where child's description of the abuse was given to a family friend within a few hours of the alleged molestation when the child was still likely to be emotionally distressed by the troubling event. *State v. Stover*, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994).

The district court did not abuse its discretion in admitting minor victim's testimony in the trials of her grandmother and grandmother's boyfriend, convicted of conspiracy to commit lewd conduct with a minor, concerning two subsequent acts of sexual intercourse by the boyfriend which occurred in the grandmother's house because, pursuant to subsection (b) of IRE 404, the testimony was highly probative, explained the victim's delay in reporting, and clearly reflected a common scheme or plan to use the grandmother's influence over the victim to compel her actions, and, pursuant to § 18-1701, it was evidence of the conspiracy itself. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995); *State v. Castillo*, 127 Idaho 257, 899 P.2d 967 (1995).

—Expert Testimony.

Conviction was reversed and a new trial ordered where the jury may have been swayed toward its finding of guilt by the inadmissible testimony of the victim's counselors and the court was unable to conclude beyond a reasonable doubt that the jury would have found defendant guilty had the opinions of the counselors been excluded. *State v. Konechny*, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000).

Although professionals appeared to be well qualified, the art or science of divining whether a child who has made allegations of sexual touching has in fact been abused called for additional expertise that was not shown to be possessed by these witnesses; therefore, on the foundation presented, the district court erred in finding these counselors qualified to testify as to their diagnoses of sexual abuse.

State v. Konechny, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000).

—Other Acts.

In prosecution for three counts of lewd conduct with a minor, evidence in the form of testimony of defendant's daughter and stepdaughter that defendant had committed other acts of molestation was relevant to show general plan to exploit and sexually abuse an identifiable group of young female victims. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

In prosecution for three counts of lewd conduct with a minor, district court did not err in holding that other acts of lewd conduct with a minor were not so remote that their probative value was not substantially outweighed by the danger of unfair prejudice where evidence of defendant's engaging in lewd conduct beginning in 1977 showed a continuous chain of such conduct by defendant. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

—Other Offense.

In trial for lewd and lascivious conduct with a 14-year-old boy, defendant's misdeed with victim's mother was not relevant to prove the conduct committed with the son. *State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985).

Where the evidence against defendant consisted of the explicit testimony of the victim, both as to the charged crime and as to previous uncharged acts, and the victim and his mother both testified to conversation which disclosed defendant's involvement with the boy and his plan to move into the house, and all of this testimony was uncontroverted and the defendant did not testify, evidence of defendant's misdeed with the victim's mother, although irrelevant and improperly admitted, did not weaken defendant's defense, and the other evidence, standing alone, was sufficient for the jury to convict defendant and to produce moral certainty and belief in an unprejudiced mind that the result would have been the same without the other crime evidence. *State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985).

Where defendant was tried for lewd conduct based on penile penetration, but acquitted, then he was retried on a different charge, which was comprised of different elements and required different facts than the lewd conduct charge, he failed to show that he was retried on the lewd conduct offense. *State v. Colwell*, 127 Idaho 854, 908 P.2d 156 (Ct. App. 1995).

District court did not err in admitting evidence of defendant's prior uncharged sexual misconduct in his trial for lewd conduct with a minor; there was sufficient similarities between the two incidents to demonstrate a

general plan by defendant to exploit and sexually abuse minor females who were friends of his children and visited his home so that the evidence was relevant and probative value was not substantially outweigh the danger of unfair prejudice. *State v. Hoots*, 131 Idaho 592, 961 P.2d 1195 (1998).

—Sufficient.

Evidence was sufficient to allow a jury to infer that defendant intended to commit lewd and lascivious conduct with a child under the age of sixteen; defendant initiated at least three online conversations with the "girl" in which he expressed his desire for a sexual relationship with her, made arrangements to meet with her for a sexual encounter, and arrived at the appointed time and place with a box of condoms in his car. *State v. Glass*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 126 (Ct. App. Nov. 17, 2003).

Guilty Plea.

The fact that the defendant may not specifically recall or admit to committing the act did not foreclose him from voluntarily pleading guilty since the defendant agreed that the evidence made a strong factual case against him, and where the record of the hearing in which the defendant pleaded guilty to a lewd and lascivious act with a minor child disclosed that he freely and voluntarily pleaded guilty with full knowledge of all the consequences, the district court properly denied the defendant's motion to withdraw the guilty plea after the sentence was imposed. *State v. Harmon*, 107 Idaho 73, 685 P.2d 814 (1984).

Where defendant in a lewd conduct and sexual abuse of a minor case initially denied the intent element of lewd conduct before the court accepted his plea of guilty, and then after a ten-minute recess, defendant admitted to the intent alleged, the trial court did not err in accepting defendant's guilty plea. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Included Offenses.

In a prosecution for lewd conduct with a minor child under 16, it was not error for trial court to refuse to instruct the jury on crime of fornication, for a child under 16 could not as a matter of law give her consent and, therefore, fornication could not be a necessarily included offense of lewd conduct with a minor. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

In a prosecution for lewd conduct with a minor child under 16 where the trial court, at the request of the prosecution, instructed the jury that statutory rape was a necessarily included offense, no prejudice resulted to defendant who was not convicted of statutory rape but was convicted of lewd conduct with a

minor child. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

The trial court did not err in failing to instruct the jury that the offense of contributing to delinquency of a minor was a lesser included offense of crime of lewd conduct with minor child under 16, where defendant failed to request such instruction. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Acts leading to statutory rape — sexual intercourse with a female child — would evince an intent necessary to invoke the lewd conduct statute and, accordingly, lewd conduct is an included offense of statutory rape. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Violation of § 18-1506 is a lesser included offense when an individual is charged with violation of this section. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

Information.

Where counts I-III of the information stated that the alleged offenses of lewd and lascivious conduct with a child under the age of 16 occurred “on or about the months between June and September, 1976,” counts IV and V stated that the alleged offenses occurred “on or about the months of May, 1976,” and “of June, 1976,” respectively, and where defendant never suggested any defense of alibi at trial, all of the counts were set forth with sufficient specificity to allow him to prepare his defense and to protect him from double jeopardy. *State v. Roberts*, 101 Idaho 199, 610 P.2d 558 (1980).

Since time is not a material ingredient in the offense of lewd and lascivious conduct with a minor, the information need only be specific enough to enable the defendant to prepare his defense and to protect him from being subsequently prosecuted for the same offense. *State v. Roberts*, 101 Idaho 199, 610 P.2d 558 (1980).

If an offense is “included” in the crime charged, a defendant may be fairly said to have constructive notice of the alleged conduct comprising it and such notice is not defeated by the fact that the included offense may carry a heavy penalty; accordingly, information charging statutory rape of a 12-year-old girl furnished constructive notice to defendant that he might be convicted of lewd conduct as an included offense. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Where court's instructions allowed jury to find defendant not guilty of lewd conduct with a minor, but guilty of sexual abuse of a minor based upon proof of facts different from those

alleged in the information for the lewd conduct charge, case was vacated and remanded. *State v. Colwell*, 124 Idaho 560, 861 P.2d 1225 (Ct. App. 1993).

Because time is not a material element of the offense of lewd and lascivious conduct with a minor, because child abuse cases involve evidence of a number of secretive offenses over a period of time, and because an information need only be specific enough to enable a defendant to prepare a defense, apprise him of the statute violated and protect him from subsequent prosecution for the same offense, the information charging defendant with lewd and lascivious act or acts with each of this two daughters between 1976 and 1979 at which time his daughters were minors was sufficiently specific as to time and not flawed. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

While the statute criminalizes “act or acts,” this language does not allow for a continuing course of conduct element; rather, the legislature's use of the plural is a recognition that a series of sexual contacts by different means which occur as a part of a single incident, a continuous transaction without significant breaks, are to be charged as a single count of lewd conduct. *Miller v. State*, 135 Idaho 261, 16 P.3d 937 (Ct. App. 2000).

Instruction.

It is not error for the trial court to refuse to define the words “lewd and lascivious” in a jury instruction, because the words are in common use and they indicate with reasonable certainty the kind and character of acts and conduct that the legislature intended to prohibit. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

Where in a prosecution for lewd conduct with a minor, the court refused the defendant's requested instruction that the testimony of the minor's older sister, regarding sexual misconduct between her and the defendant, needed to be corroborated, the court did not err as it was for the jury to assign the proper weight to corroborating evidence in their deliberations. *State v. Toothe*, 103 Idaho 187, 646 P.2d 429 (Ct. App. 1982).

In prosecution for lewd conduct with a minor, where witnesses testified that defendant was intoxicated on the day the incident took place and expert testimony established that he was an alcoholic who suffered from irreversible defuse chronic brain disease, trial court did not err in refusing to give defendant's requested instruction on the consequences of a verdict of not guilty by reason of mental disease or defect. *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983).

In prosecution for statutory rape, where lay persons unfamiliar with the underlying statutes reasonably might have interpreted the

repeated references to "lesser" offenses in jury instructions, as signifying that each of the offenses listed, including lewd conduct, was less serious than the crime charged and, moreover, reasonable jurors — noting the sequence of the offenses listed and judge's statement that the crimes were different in "degree" — well could have believed that lewd conduct was the least serious of the "lesser" crimes, the jury instruction erroneously characterized the seriousness of lewd conduct in relation to the crime charged and to other included offenses. However, the error in the instruction, relating to the seriousness of the offense, did not alter the jury's choice of the crime committed and, therefore, it was harmless beyond a reasonable doubt. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

In prosecution for rape and lewd and lascivious conduct with a minor, the defendant's proposed instruction that the charge made against the defendant was easily made, hard to prove, and harder to defend against was improper. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Judged as a whole, a jury instruction was not erroneous when it directed jurors that they could find defendant guilty of lewd conduct with a child if they were convinced beyond a doubt that would make an ordinary person hesitant to act in the important affairs of life; reference at another point in the instruction to "willingness to act" rather than "hesitancy to act" was likewise not reversible error. *State v. Kuhn*, — Idaho —, 85 P.3d 1109 (Ct. App. 2003).

Intent.

This section does not require actual arousal of either the victim or perpetrator; all that is necessary to be shown is the intent to arouse either the victim or the perpetrator. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

In a prosecution of defendant for lewd conduct with a minor under 16, the trial court did not err when it allowed three girls to testify regarding subsequent similar events involving the defendant since the evidence of the subsequent similar acts was probative of whether the requisite intent was present. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

In prosecution for lewd conduct with a minor, trial court did not err in denying defendant's motion for acquittal at the end of the state's evidence since, although state's witnesses testified that defendant was intoxicated on the day in question, the question of whether his intoxication so affected him that he could not have had the necessary intent to commit the offense was for the jury. *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983).

This section does not create a conclusive presumption of specific intent which denies due process of law. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984).

The state met its burden of proving the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the defendant, where the defendant admitted the acts necessary to a finding of guilt. *State v. Bronson*, 112 Idaho 367, 732 P.2d 336 (Ct. App. 1987).

Joinder of Counts of Conduct.

Three counts of lewd and lascivious conduct with two 14-year-old boys were properly joined where the facts demonstrated a common scheme or plan, in that the defendant frequented areas where young boys could be found, befriended boys with no father figure in the home, enticed them from their homes, lowered their natural inhibitions through the use of drugs and alcohol, and committed sex acts upon them. *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830 (1984).

Defendant suffered no actual prejudice as a result of the denial of his motion to sever because evidence regarding each separate count would be admissible to prove another count where such evidence is probative of a general plan to exploit and sexually abuse an identifiable group of young female victims. *State v. Longoria*, 133 Idaho 819, 992 P.2d 1219 (Ct. App. 1999).

Judge's Comments.

Where the defendant was convicted for committing lewd conduct with his daughter, and the trial court record showed that he had committed similar offenses between the time he was a teenager and the age of 35, the judge's passing reference to the tenets of Christianity in sentencing defendant to concurrent ten year sentences on each of two counts was, although questionable, not an abuse of discretion since the sentence imposed was less than the maximum allowed. *State v. Reimer*, 102 Idaho 299, 629 P.2d 695 (1981).

Medical Testimony.

In a case involving the alleged sexual abuse of children, nonexpert physician should not have been permitted to offer an opinion on the children's credibility, that is, he believed they were telling the truth; in a jury trial, it is for the jury to determine the credibility of a witness, not another witness, and statements by a witness as to whether another witness is telling the truth are prohibited. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Physician not qualified as expert in a child sexual abuse prosecution should not have

been permitted to offer an opinion based on the histories provided by the children and the mother, as the opinion was not based upon his own perception but instead was based on what others had related to him. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Physician should not have been allowed to offer his opinion that certain children had been sexually molested where (1) he had little if any experience with child sexual abuse; (2) the only information available to support his opinion was gleaned from one visit with the children in which he found no physical evidence of molestation; and (3) he relied solely on the histories provided by the children and the mother that the children had been molested. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Physician's opinion that children had been molested embraced an ultimate issue, and although such testimony is allowed if it will assist the trier of fact, the testimony in this case would not assist the jury because the physician was not qualified as an expert in the area of child sexual abuse and it should not have been admitted. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Multiple Offenses.

Defendant committed multiple offenses rather than one continuing offense over a period of time where each incident was a separate, distinct and independent crime, rather than a part of a continuing course of conduct without end. *Miller v. State*, 135 Idaho 261, 16 P.3d 937 (Ct. App. 2000).

Physical Examination.

In prosecution for three counts of lewd conduct with a minor, denial of defendant's motion for physical examination of victims where no physical examination of any of three victims was ever conducted was not error since defendant did not represent any evidence tending to show that an examination of the three children two to three years after the last alleged incident of abuse would have produced relevant evidence; argument of defendant that such examination would show evidence of scarring and damage to the hymen if intercourse had occurred unsupported by evidence was insufficient especially since corroboration or refutation of penetration was not dispositive since penetration was not an element of the charged offense. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

Prior Misconduct.

The trial court did not abuse its discretion in denying defendant's motion in limine to suppress evidence of alleged prior uncharged sexual misconduct, where, applying the two-tiered analysis of I.R.E. 404 used to determine admissibility of evidence concerning

other crimes, the evidence was (a) relevant to: Demonstrating a common criminal plan, showing defendant's motives or lustful disposition, indicating specific intent, and was relevant to the issue of credibility and corroboration of the victim's testimony, and (b) evidence was not too remote in time to be probative or relevant, despite gaps of 11 and three years prior to the present charged offense, because the opportunity for defendant to enact his plan or scheme of sexual abuse allegedly occurred only when there was a minor female present in his household and she reached the appropriate age for defendant's design. *State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (1991).

Prosecutorial Discretion.

Charging defendant with lewd conduct with a minor under sixteen years of age instead of incest did not constitute an abuse of prosecutorial discretion where the facts legitimately invoked both offenses. *LaBarge v. State*, 116 Idaho 936, 782 P.2d 59 (Ct. App. 1989).

Prosecutor Comments.

Where the prosecutor made several references to the defendant's failure to inform anyone in law enforcement about the alleged conspiracy of his neighbors to falsely accuse him of improper conduct with their sons, the prosecution violated the proscription against alluding to a defendant's post-arrest silence; however, the error was harmless because a reasonable jury would not have been persuaded by the defendant's theory of conspiracy, even absent the prosecutor's comments. *State v. Gooding*, 110 Idaho 856, 719 P.2d 405 (Ct. App. 1986).

Psychological.

—Evaluation.

The judge erred in a case involving lewd conduct and sexual abuse of a minor by not ordering a psychological evaluation as part of the presentence investigation or through retained jurisdiction, because, although a psychological evaluation is not required in every case where the court orders a presentence investigation, in this case, defendant had a solid work history, was a family man, and had no prior criminal record. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Although defendant lacked a history of sexual criminal behavior, he did have a history of other criminal acts; further, though he denied at trial that he committed a lewd and lascivious act, he apparently made contrary statements while in counselling sessions after being convicted and showed no remorse for his act, and acted in a way that led correction employees to conclude that he did not think his actions were wrong. A psychological eval-

uation would have added little to these observations, or the court's ability to weigh the conclusions of correction employees against its own observations and other evidence in the record; therefore, the court did not err in refusing to continue the sentencing hearing a second time to allow for a psychological evaluation. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

—Treatment.

A failure by the Board of Correction to provide psychological treatment for convicted pedophiles or other sexual offenders against not render either the conviction or the sentence unlawful. If treatment is legally required, as the United States District Court for this state has held, and if the treatment is nonexistent or is inadequate, then the proper remedy is to mandate reasonably adequate treatment. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Sentence.

Sentence of life imprisonment for 15 year old defendant did not show an abuse of discretion where the record showed that after commission of offense the defendant dragged his victim across rough ground and threw her into a 25 foot icy gorge. *State v. Reese*, 98 Idaho 347, 563 P.2d 405 (1977).

A sentence of 30 years' imprisonment for lewdly and lasciviously having intercourse with a female child 14 years of age (his own daughter) was determined to be extreme on appeal and an abuse of discretion on the part of the trial judge arising out of passion and prejudice, upon a review of the record, showing defendant to be a person in need of psychiatric treatment rather than imprisonment. *State v. Ledbetter*, 83 Idaho 451, 364 P.2d 171 (1961).

A 15-year sentence is well within the limits of the maximum sentence provided for by this section. *State v. Reese*, 98 Idaho 347, 563 P.2d 405 (1977).

Where the trial judge, in reaching his sentencing decision, considered the presentence report and its attachments, the serious effects that the crime would have on the child, the defendant's character and rehabilitation prospects, the appropriateness of probation, the societal interest in the case, and arguments by counsel, he did not abuse his discretion in sentencing defendant convicted of lewd and lascivious behavior with his nine-year-old stepdaughter. *State v. Clark*, 102 Idaho 693, 638 P.2d 890 (1981).

Where the defendant was sentenced to an indeterminate term not to exceed ten years for lewd and lascivious conduct with a minor under the age of 16, the court abused its

discretion by not giving proper consideration to the defendant's alcoholic problem, his honorable air force discharge, his support of his children and the fact that it was defendant's first felony and that he had no prior history of sexual violations. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982).

Where the oral pronouncement of sentence could be considered illegal because it imposed two concurrent life sentences on defendant, one on a lewd conduct charge and one for being a persistent violator, the subsequent written judgment of conviction showing that only one life term had been imposed would be deemed a correction of the sentence pursuant to I.C.R. 35. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

In prosecution of alcoholic defendant for lewd conduct with a minor, sentence of 15 years was well within the statutory limit; however, since it appeared that the trial court did not give proper consideration to defendant's alcoholic problem, the trial court was directed to determine, under a Rule 35 motion, whether a reduction of the sentence was in order. *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983).

Minimum sentence of 11 years and eight months was not disproportionate to the crimes of anal intercourse with a minor and did not constitute cruel and unusual punishment. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984).

The district court did not abuse its discretion in sentencing the defendant to an indeterminate 10-year sentence for lewd conduct with a minor, where the presentence report showed several prior convictions, both for misdemeanors and for felonies, where the report also indicated that the defendant had a history of abusing minors sexually, and where the sentence was substantially less than the statutory maximum of life imprisonment. *State v. Ward*, 106 Idaho 544, 681 P.2d 1019 (Ct. App. 1984).

An act by an adult male attempting to sexually penetrate an eight year old female child cannot be said to be nonviolent; molestation of such a young child is inherently coercive and akin to violence. Thus, the district court did not abuse its discretion in imposing a 15 year indeterminate prison term even though it was the defendant's first offense. *State v. Harmon*, 107 Idaho 73, 685 P.2d 814 (1984).

The trial court did not err in sentencing defendant to a fixed term of 15 years rather than an indeterminate sentence upon connection of two counts of lewd conduct with a minor under 16, considering the defendant's prior conduct with minor girls, his psychiatric prognosis, and his prior felony record. *State v.*

Lawrence, 107 Idaho 867, 693 P.2d 1069 (Ct. App. 1984).

Two concurrent and indeterminate 25-year sentences for lewd conduct were not excessive in view of the length of time the misconduct had gone on, the use of force and violence upon the victim, the threats of violence to her, the depravity of the acts performed and the serious alcohol and drug abuse problems that were demonstrated. *State v. Glandon*, 109 Idaho 755, 710 P.2d 665 (Ct. App. 1985).

Where sexual molestation of a six-year-old girl occurred during a period of approximately seven months, defendant apparently threatened to harm the child if she told her mother of his conduct, defendant had a record of criminal activity ranging from vagrancy and burglary to a prior conviction for lewd conduct, and a psychological evaluation resulted in a diagnosis that defendant was a pedophile who had no internal conflict about taking advantage of children, the imposition of a fixed term sentence of 20 years was reasonable in order to protect society. *State v. Rutherford*, 109 Idaho 1016, 712 P.2d 717 (Ct. App. 1985).

Where the defendant, who was mentally ill, was sentenced to a 15-year indeterminate sentence, his sentence was well within the statutory maximum, the judge applied the criteria provided by § 19-2523 for situations where the mental condition of a defendant is a significant factor in sentencing, and the judge also specifically made the findings required by subsection (2) of § 19-2523 that allowed him to authorize continued medical treatment for the defendant; therefore the district court did not abuse its discretion. *State v. Desjarlais*, 110 Idaho 100, 714 P.2d 69 (Ct. App. 1986).

Where the defendant had been a successful businessman, had served in the military, and had no prior criminal record, the violations were committed within a fairly short period of time, and he suffered from emotional and psychological problems, the district court did not abuse its discretion in sentencing him to consecutive indeterminate terms of 20 and 10 years for two counts of lewd and lascivious conduct with children under sixteen years of age in order to protect the public and provide rehabilitation. *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986).

Where, for at least seven years, the defendant engaged in virtually every imaginable form of sexual activity with his minor daughter before she reached the age of 12, and these activities were not terminated voluntarily by the defendant nor had he ever sought counseling, medical, or psychological help for his pedophilia, the trial court did not abuse its discretion in sentencing him to an indeterminate life sentence. *State v. Van Newkirk*, 110 Idaho 581, 716 P.2d 1353 (Ct. App. 1986).

Where the court reviewed possible pro-

grams available to both offenders and victims involved in sexual abuse, reflected on the rehabilitation and probation plan proposed by the defendant to start a new life with a woman the defendant had recently become acquainted with and her two minor daughters, and reviewed the nature and extent of the defendant's sexual involvement with his own daughter, the court did not fail to take into account all of the objectives of criminal punishment in sentencing the defendant to an indeterminate life sentence. *State v. Van Newkirk*, 110 Idaho 581, 716 P.2d 1353 (Ct. App. 1986).

The trial court did not abuse its discretion in sentencing the defendant to an indeterminate life sentence for masturbating two 11-year-old boys, where his presentence report showed he was previously convicted of encouraging violation of the Youth Rehabilitation Act (now Juvenile Corrections Act, § 20-501 et seq.), driving while under the influence, and two counts of the infamous crime against nature, and he had been discharged from this state's penitentiary after serving a sentence for the infamous crime against nature approximately ten months before the offenses in the present case were committed. *State v. Gooding*, 110 Idaho 856, 719 P.2d 405 (Ct. App. 1986).

Where the defendants raped and sodomized a 12-year-old girl, the fixed 30-year sentence for rape, fixed 30-year sentence for lewd conduct with a minor, fixed 15-year sentence for aggravated battery, and the indeterminate 25-year sentence for second-degree kidnapping were not an abuse of discretion. *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986).

An indeterminate life sentence with parole eligibility for the crime of lewd and lascivious conduct with a minor under former § 18-6607 (amended and redesignated as this section) was not disproportionate and unconstitutional. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), aff'd, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

The court did not abuse its discretion in imposing a ten-year sentence with a three-year minimum period of confinement on a defendant convicted of lewd conduct with her minor daughter, where the maximum penalty defendant could have received was life imprisonment and notwithstanding the fact that the defendant lacked a serious criminal history and was a victim of both physical and mental handicaps. *State v. Arnold*, 115 Idaho 736, 769 P.2d 613 (Ct. App. 1989).

District court did not abuse its sentencing discretion by imposing a 15-year prison term with a five-year minimum period of confinement for a defendant convicted of lewd conduct with his 11-year-old stepdaughter where

defendant denied the full history of his sexual contacts with the victim, despite substantial evidence to the contrary, and where the judge expressed that the case was one of the most aggravated cases he had ever seen. *State v. Beamis*, 115 Idaho 735, 769 P.2d 612 (Ct. App. 1989).

An order revoking probation and reinstating a five-year indeterminate sentence for a defendant convicted of lewd conduct with a minor was proper after defendant violated his probation by being convicted of a misdemeanor charge of lewdness in another state. *State v. Kerr*, 115 Idaho 725, 769 P.2d 602 (Ct. App. 1989).

Only if a sequence of events is established that separates acts of lewd conduct from those of rape may a defendant be sentenced separately for lewd conduct. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

The court did not abuse its discretion by imposing an indeterminate sixteen-year sentence on a defendant who pled guilty to lewd conduct with a child under 16, where it was apparent from the record that the court focused upon the defendant's mental impairment, his condition and whether he posed a risk to society; in sentencing, the court emphasized defendant's refusal to admit his involvement in the offense. *State v. Whitehawk*, 116 Idaho 827, 780 P.2d 149 (Ct. App. 1989), *aff'd*, 117 Idaho 1022, 793 P.2d 695 (1990).

A sentence of 15 years with a five-year minimum period of confinement was reasonable where: defendant was convicted of lewd conduct with a minor; the lewd conduct consisted of manual and oral contact with the genitals of his six-year old stepdaughter; he failed to cooperate with evaluators attempting to determine his propensity to commit future sex offenses; defendant had a prior felony record, including a forgery and two controlled substance offenses, and he had a long record of alcohol and drug abuse. *State v. Snelson*, 117 Idaho 427, 788 P.2d 242 (Ct. App. 1990).

Notwithstanding the dilemma posed where little rehabilitation allegedly is available in the penitentiary in which defendant is confined, and where § 20-223 places stringent requirements for defendant's possible release on parole, two-year minimum periods of confinement with regard to convictions on two counts of lewd conduct with a minor were reasonable sanctions for the crimes committed, and the aggregate 15-year maximum terms were reasonable outside limits of custody if defendant fails to demonstrate that he can be returned safely to the community at an earlier time. *State v. Smith*, 117 Idaho 657, 791 P.2d 38 (Ct. App. 1990).

A fixed, five-year sentence on a sexual abuse charge and an indeterminate life sentence with a five-year minimum period of

incarceration on a lewd conduct charge, which were to run concurrently, were not excessive nor an abuse of discretion even though the court declined to follow the treatment recommendations of the evaluating psychologists. *State v. Bartlett*, 118 Idaho 722, 800 P.2d 118 (Ct. App. 1990).

Where defendant was convicted of lewd conduct with a minor, and was sentenced to 12 years in prison with a minimum period of confinement of four years; where the district court had before it the pre-sentence investigation report which indicated that defendant did not have a prior criminal record, but also that he was unwilling to admit to or accept responsibility for his actions; and where the court showed concern about protecting society from a man who was unwilling to accept responsibility for molesting a child, and also properly considered the sentencing goal of rehabilitation, the appellate court was unable to discern any abuse of discretion by the trial court. *State v. Ortiz-Valencia*, 118 Idaho 850, 801 P.2d 57 (Ct. App. 1990).

Where 21-year-old defendant who was convicted of two charges of lewd conduct with a minor, and one charge of sexually abusing a child under the age of 16, had a troubled past as evidenced by (1) the fact that at an early age he was exposed to alcohol and drugs in an unstable family, (2) his admission to having a drinking problem, which sometimes resulted in violent behavior, (3) prior charges which included petit larceny, sodomy, and assault, (4) prior unsuccessful sentences of probation and (5) the fact that he had been given several opportunities to attend treatment facilities and all attempts to rehabilitate him had been unsuccessful, sentences of a fixed term of 20 years, plus an indeterminate term of 10 years on each of two charges of lewd conduct with a minor and in addition, a fixed term of ten years plus an indeterminate term of five years for one charge of sexually abusing a child under the age of 16 were reasonable. *State v. Waddoups*, 119 Idaho 363, 806 P.2d 456 (Ct. App. 1991).

The imposition of a ten-year fixed term and an additional ten-year indeterminate term for a conviction of lewd conduct with a minor was not an abuse of discretion. *State v. Powell*, 120 Idaho 707, 819 P.2d 561 (1991).

A unified sentence of ten years in the custody of the Board of Corrections with a minimum period of confinement of 30 months for lewd conduct with a child under the age of 16, was not unreasonable, where defendant pled guilty to a charge that he had engaged in sexual activity with his daughter, age 15, and had been molesting her including sexual intercourse, since she was seven years old. *State v. Nelson*, 121 Idaho 141, 823 P.2d 175 (Ct. App. 1991).

One can receive a maximum penalty of life

imprisonment pleading guilty to one count of lewd conduct with a minor under the age of 16. *State v. Browning*, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992).

Where defendant did not have an extensive prior criminal record, but had engaged in sexual abuse of his daughter over a long period of time, a sentence of 15 years' imprisonment with a four-year minimum period of confinement was not an abuse of discretion and sentence was reasonable. *State v. Kingston*, 121 Idaho 879, 828 P.2d 908 (Ct. App. 1992).

A unified sentence of ten years in the custody of the Board of Correction with a minimum period of confinement of five years for lewd conduct with a minor under the age of 16 was reasonable where defendant was charged with four counts of lewd conduct with a minor, allegedly occurring over a five-month period, and involving two of his nieces between the ages of eight and ten years old and pursuant to a plea bargain, the State agreed to dismiss three of the counts in exchange for defendant's plea of guilty to the remaining count. *State v. Rosa*, 121 Idaho 982, 829 P.2d 872 (Ct. App. 1992).

Where defendant indicated that if the opportunity arose again to become involved with a teenage girl, defendant would feel no compunction about pursuing such an activity and, in the future, his aggressive nature might result in a crime of greater violence, and defendant had a history of other criminal acts, a sentence of seven years determinate followed by an additional indeterminate seven year period, for lewd and lascivious conduct with a minor under the age of sixteen, was not an abuse of discretion. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Defendant's sentences of a three year minimum period of confinement for lewd conduct with a minor child, and of three years minimum confinement for first-degree burglary, to be served concurrently, were not an abuse of discretion; defendant was on probation for grand theft and forgery convictions and presentence investigation revealed prior lewd and lascivious conduct with children. *State v. Harris*, 122 Idaho 216, 832 P.2d 1151 (Ct. App. 1992).

A sentence of a 20-year minimum period of confinement for conviction of lewd conduct with a child under 16, and of a determinate period of 15 years without parole on each of three counts of burglary, was not excessive; psychologist opined that defendant's prognosis for establishing and maintaining non-offending behavior was poor, defendant admitted to previous conduct for sexual gratification, and his prior record included arrests for possession of controlled substances, probation violation, resisting arrest,

driving while under the influence, numerous traffic violations, indecent exposure and public nuisance. *State v. Taylor*, 122 Idaho 218, 832 P.2d 1153 (Ct. App. 1992).

The district court commented at hearing on motion to reduce defendant's sentence for lewd conduct with a minor that defendant had made inconsistent statements concerning his guilt before and after sentencing and that the time for defendant to express remorse and exhibit a suitability for treatment should have been between the time of the guilty verdict and sentencing. In determining not to grant leniency, the district court emphasized that any lesser sentence would depreciate the seriousness of the crime, the need to deter others, and that society must be protected from a person who was not amenable to treatment at the time of sentencing. *State v. Fullerton*, 122 Idaho 319, 834 P.2d 321 (Ct. App. 1992).

A unified sentence of 15 years in the custody of the Board of Correction, with a minimum period of confinement of five years for lewd conduct with a minor was not unreasonable, where defendant had previously been convicted on one count of assault, one count of malicious injury to property, had had his driving privileges suspended and had used marijuana and cocaine although he had not had other sexual incidents with minors. *State v. Fullerton*, 122 Idaho 319, 834 P.2d 321 (Ct. App. 1992).

Where defendant had a history of previous convictions for lewd conduct with minors and had violated probation on other occasions, although counseling would not be available in custody the district judge's ruling was consistent with the often cited primary sentencing goal of protection of society; the district judge had sufficient information to decide that probation was not working and that continued probationary status would endanger the public, particularly young boys. *State v. Beckett*, 122 Idaho 324, 834 P.2d 326 (Ct. App. 1992).

The trial court did not abuse its discretion in imposing a 15-year to life sentence for conviction of lewd conduct with a minor, and a concurrent indeterminate sentence of 20 years for another conviction of lewd conduct with a minor where defendant had a long history of homosexual pedophilia and defendant denied he had a sexual abuse problem. *State v. Wavrick*, 123 Idaho 83, 844 P.2d 712 (Ct. App. 1992).

Where the sentencing judge properly considered the sentencing criteria and expressed a well-founded concern regarding the need to protect society from defendant's pedophilic tendencies, the sentences imposed on defendant for two counts of lewd conduct with a child under the age of sixteen were not unreasonable. *State v. Fluery*, 123 Idaho 9, 843 P.2d 159 (Ct. App. 1992).

The district court did not abuse its discretion by sentencing defendant to a fixed term of life in prison where the record revealed that defendant had previously been convicted for a sexual offense against a minor, where defendant was HIV-positive at the time of the acts for which he was convicted, and where there was sexual misconduct between defendant and minors during the sentencing proceedings. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

A unified twenty-five years to life sentence imposed for a guilty plea to lewd and lascivious conduct with a minor was not excessive where the nature of the offense was very significant and severe and where defendant had a severe and long-standing pattern of sexual contact with his minor daughters. *State v. Reed*, 123 Idaho 860, 853 P.2d 605 (Ct. App. 1993).

The judgments of conviction for two counts of rape and one count of lewd conduct with a minor, including the imposition of three concurrent life sentences with a mandatory period of fifteen years' incarceration was not unreasonable where defendant, a forty-one year old teacher, pled guilty to having sexual intercourse with three female students, all of whom became pregnant. *State v. Campbell*, 123 Idaho 922, 854 P.2d 265 (Ct. App. 1993).

Where defendant pled guilty to lewd conduct with a minor under sixteen, sentence of an indeterminate life term, with a ten-year period of minimum confinement, was not an abuse of discretion. *State v. Koho*, 124 Idaho 194, 858 P.2d 334 (Ct. App. 1993).

In light of a psychological assessment that defendant represented a risk to minor children with whom he had unsupervised contact and had an extremely high risk of reoffending, as well as defendant's history of sexual misconduct, defendant's sentence of minimum term of incarceration of ten years, to be followed by an indeterminate term of thirty years, was not excessive. *State v. Law*, 124 Idaho 288, 858 P.2d 827 (Ct. App. 1993).

Sentence of fixed term of five years, followed by an indeterminate term of fifteen years for lewd conduct with a minor was not excessive, where defendant had a history of mental problems and had previously been convicted of making obscene phone calls. *State v. Adams*, 124 Idaho 372, 859 P.2d 970 (Ct. App. 1993).

Where defendant's sentence of four years to life was within the range provided by this section, review by the Court of Appeals was limited to determining whether a four-year minimum confinement period represented as abuse of discretion. *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994).

Sentencing a defendant convicted of three counts of lewd conduct with a minor to three concurrent indeterminate sentences of twenty

years with a fixed ten-year sentence under the Unified Sentencing Act was not an abuse of discretion because defendant had no prior felony conviction, had good employment history, the fact that the offenses for which he was convicted did not involve violence, and the availability of probation with comprehensive terms as an alternative sentence, although evidence was presented showing that defendant had previously molested both his daughter and step-daughter and a psychological evaluation of defendant prepared as part of the pre-sentence investigation concluded that he was at risk to offend again. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

Where defendant argued that the minimum period of confinement under § 19-2513 for his conviction for lewd conduct with a minor of less than sixteen years of age under this section was an abuse of discretion, he must establish his claim that it was an abuse of discretion in light of any reasonable view of the facts. *State v. Bjorklund*, 126 Idaho 656, 889 P.2d 90 (Ct. App. 1994).

The unified twenty-year sentence, with five years as a minimum period of confinement, for father convicted of lewd conduct with a minor, who was his adopted child, was within the limit provided by this section and was not illegal. *State v. Viehweg*, 127 Idaho 87, 896 P.2d 995 (Ct. App. 1995).

Determinate life sentence imposed upon defendant for guilty plea to one count of lewd and lascivious conduct with a minor under the age of 16 was not excessive nor an abuse of discretion when the facts revealed a very tragic scenario of defendant's long-term sexual molestation of his 14-year-old daughter and several aggravating factors, including the finding that he would likely re-offend and possibly kill his daughter. *State v. Hibbert*, 127 Idaho 277, 899 P.2d 987 (Ct. App. 1995).

Where a father was convicted of holding down his six-year old daughter, taping her mouth shut and raping her on several occasions without showing any remorse for his actions, his unified life sentence, with 20-years' fixed, was not out of all proportion to the gravity of the offense committed, nor was the sentence so severe as to shock the conscience of reasonable people. *State v. Coffelt*, 127 Idaho 439, 901 P.2d 1340 (Ct. App. 1995).

Where charges were filed as a result of defendant's sexual abuse of his nephew and niece and the abuse of the nine-year-old nephew included oral and anal sex over some period of time while the 14-year-old niece stated that she had been abused on approximately 30 occasions by defendant, and that at times she was paid money by defendant for acts of oral sex and vaginal and anal intercourse, sentence of a unified term of 29 years with 9 years fixed was not unreasonable under any view of the facts. *Chouinard v. State*,

127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

Upon review of the record of the proceedings in which defendant was convicted of performing lewd conduct on a minor, the court determined that defendant's two concurrent unified sentences of 10 years with three-year minimum terms of confinement served to protect society and to achieve any or all of the related goals of deterrence, rehabilitation, and retribution and did not constitute an abuse of discretion. *State v. Valverde*, 128 Idaho 237, 912 P.2d 124 (Ct. App. 1996).

Unified life sentence with a minimum term of ten years' confinement for lewd and lascivious conduct with a minor conviction and a determinate sentence of five years for sexual abuse of a minor conviction were not unreasonable and were affirmed where evidence showed an undue risk that defendant would commit other, similar crimes and lesser sentences would depreciate the seriousness of the crimes. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996), cert. denied, 519 U.S. 1118, 117 S. Ct. 964, 136 L. Ed. 2d 849 (1997).

In prosecution for two counts of lewd conduct with a minor under 16, a sentence to a fixed term of life in prison without a retained jurisdiction period was excessive, where defendant who had a prior conviction for similar behavior admitted that he had molested his stepdaughters, since the behavior involved did not involve penetration of any type, nor were there any allegations of force, where counseling that defendant underwent after prior conviction was not part of a recognized sex-offender treatment program, where he has indicated that he wished to undergo treatment and will cooperate in every way necessary, and where he took full responsibility for his conduct and did not blame the victims in anyway and has abstained from drugs and alcohol and has worked fairly steadily throughout his adult life. *State v. Jackson*, 130 Idaho 293, 939 P.2d 1372 (1997).

Where the district court's comments ad-

ressed whether the defendant would be amenable to rehabilitation in light of his continued denial of guilt, and where the court considered the protection of society when it stated the defendant posed a threat, the defendant failed to demonstrate that his sentence was the result of vindictive or punitive actions by the court to punish his exercise of his right to trial. *State v. Murphy*, 133 Idaho 489, 988 P.2d 715 (Ct. App. 1999).

Based upon the facts and circumstances of defendant's offenses and his character and history presented at the sentencing hearing, the trial court did not abuse its discretion by concluding that a three-year fixed term of incarceration was necessary for the protection of society. *State v. Longoria*, 133 Idaho 819, 992 P.2d 1219 (Ct. App. 1999).

—Addressing Child Victim.

The trial court did not commit error by addressing a child abuse victim by her first name where counsel for defendant used the victim's first name throughout the proceedings, as did the state. *State v. Larsen*, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993).

Unsuccessful Attempts.

Where defendant did not deny that he intended to engage in sexual relations with a minor girl for the purpose of gratifying his sexual desires, which would have amounted to a crime in violation of § 18-1508, or that his actions went beyond mere preparation, the evidence was sufficient to support his conviction for attempted lewd conduct with a minor under 16 years of age; and the statute provided no exception for one who intended to commit a crime but failed because he was unaware of some fact that would have prevented him from completing the intended crime, such as the fact that a police officer was impersonating the teenage girl the defendant thought he was chatting with online; therefore, it had eliminated impossibility as a defense to attempt. *State v. Curtiss*, 138 Idaho 466, 65 P.3d 207 (Ct. App. 2002).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Chastity of victim.
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Chastity of Victim.

In a lewd or lascivious conduct case, the victim's lack of chastity is not a ground for impeachment. *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

Competency as Witness.

In prosecution of defendant for committing of lewd and lascivious acts on daughter the latter though only 12 years of age at the time

of trial was competent to testify where on voir dire it was disclosed that she was capable of receiving just impressions and relating them truly to the jury. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953).

Constitutionality.

Use of terms "lewd" and "lascivious" did not violate Const., Art. 1, § 13, since acts thus defined were further limited by the specific intent required under former law regarding lewd and lascivious conduct with a minor. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

Construction.

Provision inflicting punishment of "a term of not more than life" for wilful and lewd or lascivious acts upon the body of a child under the age of 16 though cruel and unusual punishment would be construed as permitting the trial court to fix a maximum sentence of less than life under the Indeterminate Sentence Act, § 19-2513. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

Use of terms "lewd" and "lascivious" in defining acts punishable under former law did not render language uncertain, since terms used are words in common use understandable to a person of ordinary understanding. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

Corroboration.

The prosecutrix was only 10 years of age and her character or reputation for truth and chastity was in no respect impeached nor was her testimony contradictory or inconsistent with any admitted facts of the case; therefore, her testimony might be corroborated by direct evidence or evidence of surrounding circumstances. *State v. Tope*, 86 Idaho 462, 387 P.2d 888 (1963).

In prosecution under former law regarding law and lascivious conduct with a minor the testimony of the prosecuting witness had to be corroborated, either by direct evidence or evidence of surrounding circumstances. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953); *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

There was corroboration of the testimony of complaining witness both as to the commission of a lewd and lascivious act upon a minor child under 16 but also as to the fact that it was the defendant who had performed the act. *State v. Tope*, 86 Idaho 462, 387 P.2d 888 (1963).

In prosecution for lewd or lascivious conduct, a prosecuting witness' testimony in regard to lewd or lascivious acts performed upon another prosecuting witness is entitled to the same corroborative effect given to the testimony of any other eyewitness. *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

In prosecution for lewd or lascivious conduct with a child under the age of 16 years, testimony of accomplice may corroborate that of the victim's testimony. *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

Discretion of Court.

In prosecution of defendant for committing of lewd and lascivious acts on 11 year old daughter, trial court did not abuse its discretion in refusing to exclude daughter and her mother for crying while 14 year old son was testifying on stand. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953).

Refusal of bail pending appeal of one convicted of lewd conduct with minor under 16 and sentenced for life as not an abuse of discretion though defendant desired to undergo treatment for mental condition. *State v. Iverson*, 76 Idaho 117, 278 P.2d 205 (1954).

Effect on Unemployment Compensation.

An employee discharged from the postal service because of conviction of violation of former law regarding lewd and lascivious conduct with a minor was "discharged for misconduct in connection with his employment" within the meaning of § 72-1366 of the Employment Security Law, as an employer has the right to expect his employees to refrain from acts which would bring dishonor on the business name or the institution. *O'Neal v. Employment Sec. Agency*, 89 Idaho 313, 404 P.2d 600 (1965).

Evidence.

Evidence justified conviction of defendant, age 15, of acts of lewd and lascivious conduct on body of 13 year old girl, where the record showed that the defendant seized girl, choked her into unconsciousness, removed her clothing, and took indecent liberties with her, as against his contention that he was only motivated by curiosity to see her in the nude. *State v. Iverson*, 77 Idaho 103, 289 P.2d 603 (1955).

Typewritten statement of prosecutrix made out of the presence or hearing of defendant was hearsay and inadmissible, and defendant, by cross-examining as to the statement did not waive his objection to its use, however instruction of the court that jury should disregard all references to the statement was sufficient to cure any error. *State v. McConville*, 82 Idaho 47, 349 P.2d 114 (1960).

Testimony of eye-witness to the crime, with other evidence, was sufficient to support a verdict of guilty when alleged newly discovered evidence went only to the credibility of the prosecutrix who in direct examination gave only one answer directly tending to incriminate the defendant. *State v. McConville*, 82 Idaho 47, 349 P.2d 114 (1960).

Information.

Information which charged defendant with committing a wilful and lewd act on the body

of a minor child under 16 with the intent of arousing passion, setting forth the specific act complained of, sufficiently alleged a crime against nature. *State v. Wall*, 73 Idaho 142, 248 P.2d 222 (1952).

In information, which charged defendant with committing lewd and lascivious acts committed on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and of said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant with lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218, appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Charge of lewd and lascivious conduct on body of female child under age of 16 does not necessarily include assault with intent to rape, but charge of assault with intent to rape minor child does include charge of lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Information which charged commission of offense in substantially the same wording as used in former law regarding lewd lascivious conduct with a minor child was sufficient. *State v. Johnson*, 74 Idaho 269, 261 P.2d 638 (1953).

The information should reflect the name of the prosecutrix as such data is an essential part of the charge against the defendant for the crime of lewd and lascivious conduct. *State v. Thurlow*, 85 Idaho 96, 375 P.2d 996 (1962).

Instruction.

In prosecution involving 11-year-old girl it was error but not reversible error to instruct jury that it was not necessary to touch the skin of the victim where there was no evidence in the record to which the instruction could be applied. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953).

Intent.

An intent to injure the victim was not required by former law regarding lewd and lascivious conduct with a minor child. *State v. Johnson*, 74 Idaho 269, 261 P.2d 638 (1953).

While intent is an element of this crime, it may be shown by the defendant's acts and the surrounding circumstances. *State v. Ross*, 92 Idaho 709, 449 P.2d 369 (1968), overruled on other grounds, *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

Right to Counsel.

It is incumbent upon the court upon an arraignment for an offense such as lewd and

lascivious conduct to ascertain if the defendant is financially capable of hiring counsel and to advise the defendant in order that he may intelligently respond to the court's interrogation upon this subject. Unless informed of these statutory rights it is conceivable that defendant would not know if their existence and his inability to employ counsel would operate to deny him the opportunity to assert defenses to the charge in violation of his rights of due process. *State v. Thurlow*, 85 Idaho 96, 375 P.2d 996 (1962).

Where certain factors exist which may render state criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the constitution requires the accused must have legal assistance at his trial, such factors being the age and education of the defendant, the conduct of the court, the complicated nature of the offense charged and the possible defenses thereto. *State v. Thurlow*, 85 Idaho 96, 375 P.2d 996 (1962).

Sentence.

Sentence of life imprisonment for 15-year-old defendant did not show an abuse of discretion where the record showed that after commission of offense the defendant dragged his victim across rough ground and threw her into a 25 foot icy gorge. *State v. Iverson*, 77 Idaho 103, 289 P.2d 603 (1955).

A sentence of 30 years' imprisonment for lewdly and lasciviously having intercourse with a female child 14 years of age (his own daughter) was determined to be extreme on appeal and an abuse of discretion on the part of the trial judge arising out of passion and prejudice, upon a review of the record, showing defendant to be a person in need of psychiatric treatment rather than imprisonment. *State v. Ledbetter*, 83 Idaho 451, 364 P.2d 171 (1961).

Testimony of Spouses.

Objection to testimony of defendant's wife in a prosecution under former law regarding lewd and lascivious conduct with a minor child was properly sustained. *State v. McGonigal*, 89 Idaho 177, 403 P.2d 745 (1965).

Unsuccessful Attempts.

The former law regarding lewd and lascivious conduct with a minor did not violate the equal protection clause of the 14th Amendment of the Federal Constitution on the ground that punishment "for a term of not more than life" was imposed, whereas a term of only 14 years or less was inflicted for assault with intent to commit rape in § 18-907, since acts enumerated in the former section were not necessarily the same as those described in § 18-907. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

Defendant's assertion that the section un-

der which he was proceeded against was unconstitutional was disregarded, its constitutionality having been previously upheld in *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952). *State v. Thurlow*, 85 Idaho 96, 375 P.2d 996 (1963).

Collateral References. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

18-1508A. Sexual battery of a minor child sixteen or seventeen years of age — Penalty. — (1) It is a felony for any person at least five (5)

years of age older than a minor child who is sixteen (16) or seventeen (17) years of age, who, with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of such person, minor child, or third party, to:

- (a) Commit any lewd or lascivious act or acts upon or with the body or any part or any member thereof of such minor child including, but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of explicit sexual conduct as defined in section 18-1507, Idaho Code; or
- (b) Solicit such minor child to participate in a sexual act; or
- (c) Cause or have sexual contact with such minor child, not amounting to lewd conduct as defined in paragraph (a) of this subsection; or
- (d) Make any photographic or electronic recording of such minor child.

(2) For the purpose of subsection (b) of this section, "solicit" means any written, verbal or physical act which is intended to communicate to such minor child the desire of the actor or third party to participate in a sexual act or participate in sexual foreplay, by the means of sexual contact, photographing or observing such minor child engaged in sexual contact.

(3) For the purpose of this section, "sexual contact" means any physical contact between such minor child and any person or between such minor children which is caused by the actor, or the actor causing such minor child to have self contact.

(4) Any person guilty of a violation of the provisions of subsection (1)(a) of this section shall be imprisoned in the state prison for a period not to exceed life.

(5) Any person guilty of a violation of the provisions of subsections (1)(b), (1)(c), or (1)(d) of this section shall be imprisoned in the state prison for a period not to exceed fifteen (15) years. [I.C., § 18-1508A, as added by 1992, ch. 249, § 1, p. 733.]

Sec. to sec. ref. This section is referred to in §§ 18-8304, 19-2520G, 19-5506, 33-1208 and 72-1025.

Sentence.
Testimony of witnesses.

ANALYSIS

Constitutionality.
Defenses.
—Consent.
—Mistake of fact.
Information.
Prior bad acts.
Prior convictions.
Search warrant.

Constitutionality.

Because this section gives notice of what is "sexual contact," it has guidelines and it imposes sufficient discretion and because the term "sexual act" is not so ambiguous that a person of common intelligence would have to guess at its meaning and differ with others as to its application, this section is not unconstitutionally vague; conviction upheld. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

Because § 18-1508A(1)(d) regulates a vast amount of expressive activity and is not narrow enough to avoid criminalizing constitutionally protected conduct, the statute is unconstitutional on its face. *State v. Bonner*, 138 Idaho 254, 61 P.3d 611 (Ct. App. 2002), review denied, — Idaho —, 61 P.3d 611 (2003).

Defenses.

—Consent.

Because the legislature stated it intended to extend the protection offered in §§ 18-1506 and 18-1508 to minors aged sixteen and seventeen when enacting this section and because consent is not a defense to § 18-1508, consent is also not a defense to this section. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

—Mistake of Fact.

The legislature, in codifying the crime of sexual battery of a minor child 16 or 17 years of age under this section, intended to incorporate the immemorial tradition of the common law that a mistake of fact as to the complainant's age is no defense; trial court's instructions were correct, conviction affirmed. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

Information.

There was no error in trial court's acceptance of defendant's guilty plea even though there was an error in the information and amended information filed against defendant, where the information charged that the acts occurred between July 2, 1990 and August 15, 1992, and where defendant made no objection and did not attempt to withdraw the plea before the trial court but appealed from the judgment of conviction; there is no requirement that the trial court must establish a factual basis for the crime charged prior to accepting a guilty plea. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

Prior Bad Acts.

Evidence that defendant spoke to child sexual battery victim about a prior sexual scenario involving a stripper immediately before he touched the victim's breast was relevant and admissible to prove intent and because it was interconnected with the charged offense. *State v. Avila*, 137 Idaho 410, 49 P.3d 1260 (Ct. App. 2002).

Prior Convictions.

The defendant's prior conviction for lewd and lascivious conduct was relevant for impeachment purposes in his trial for sexual battery of a minor, where the issue of credibility was central to the case, and where the probative value of the evidence outweighed the prejudicial effect. *State v. Thompson*, 132 Idaho 628, 977 P.2d 890 (1999).

Search Warrant.

A magistrate could have properly and reasonably relied on a common-sense reading of a police officer's affidavit, and had a substantial basis for finding that, contained within the items seized by the police, there was evidence that the defendant made photographic recordings of a minor child with the intent to gratify the lust, passions, or sexual desire of the actor, minor child, or a third party. *State v. Weimer*, 133 Idaho 442, 988 P.2d 216 (Ct. App. 1999).

Sentence.

In order for defendant to show that his sentence is excessive, he must establish that, under any reasonable view of the facts, a period of confinement of three years for his conviction of sexual battery of a minor was an abuse of discretion. Where reasonable minds might differ, the court will not substitute its own view for that of the sentencing judge. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

Sentence of eight years with a minimum period of confinement of three years for defendant convicted of sexual battery of a minor child 16 or 17 years old was not excessive nor an abuse of trial court's discretion, where the minor had been placed in defendant's home as a foster child; although defendant had no prior criminal record, had an excellent work history, and had the continued support of his wife, family and church, since the reason for the minor's placement was her allegations of sexual abuse perpetrated on her by her father, and once in the defendant's home there were approximately five acts of sexual battery over a three-month period which included acts of unprotected intercourse and the minor became pregnant, and while there was support in the record for the defendant's claim that the sexual intercourse was consensual, defendant's abuse of his position of trust as a foster parent to a troubled adolescent was a very serious aggravating factor. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

District court's sentence of two consecutive unified sentences of fifteen years with two and one-half years fixed (total of 5 years fixed), for conviction on two counts of sexual battery of a minor child sixteen or seventeen years of age was not unreasonable and was affirmed where defendant had a considerable criminal history, showed he would use his intelligence to take advantage of others, had committed similar acts, had failed at several chances of rehabilitation, and had acted reprehensibly. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

Testimony of Witnesses.

The probative value of testimony of three adult massage clients that they believed the defendant's contact with their vaginal areas

was not accidental was not substantially outweighed by the prejudice to the defendant, where he had introduced evidence in his trial

on a charge of sexual battery of a minor that his massages were not sexual in nature. *State v. Cardell*, 132 Idaho 217, 970 P.2d 10 (1998).

18-1509. Enticing of children. — (1) A person shall be guilty of a misdemeanor if that person attempts to persuade, or persuades, whether by words or actions or both, a minor child under the age of sixteen (16) years to either:

(a) Leave the child's home or school; or

(b) Enter a vehicle or building; or

(c) Enter a structure or enclosed area, or alley, with the intent that the child shall be concealed from public view;

while the person is acting without the authority of (i) the custodial parent of the child, (ii) the state of Idaho or a political subdivision thereof or (iii) one having legal custody of the minor child. Nothing contained in this section shall be construed to prevent the lawful detention of a minor child or the rendering of aid or assistance to a minor child.

(2) Every person who is convicted of a violation of the provisions of this section shall be punished by imprisonment in the county or municipal jail for not more than six (6) months or by a fine of not more than one thousand dollars (\$1,000) or by both such fine and imprisonment. A person convicted a second or subsequent time of violating the provisions of this section shall be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a period of time of not more than five (5) years. [I.C., § 18-1509, as added by 1985, ch. 81, § 1, p. 156.]

Compiler's notes. A former § 18-1509 which comprised S.L. 1957, ch. 197, § 4, p. 407 was repealed by S.L. 1969, ch. 325, § 11.

Section 2 of S.L. 1985, ch. 81 declared an emergency. Approved March 13, 1985.

Sec. to sec. ref. This section is referred to in § 18-310.

Cited in: *State v. Sindak*, 113 Idaho 893, 749 P.2d 1018 (Ct. App. 1988).

ANALYSIS

Definitions.

— Home.

Instructions.

Validity of statute.

Definitions.

— Home.

Where a child was spending the night in a travel trailer, and where the trailer was in the yard of the family residence, approximately ten to 12 feet from the parents' bedroom, the

travel trailer was considered a home within the context of this section, as the terms "home" and "dwelling" are synonymous. *State v. Sindak*, 116 Idaho 185, 774 P.2d 895 (1989), cert. denied, 493 U.S. 1076, 110 S. Ct. 1125, 107 L. Ed. 2d 1032 (1990).

Instructions.

Because the "enticing" instruction would not have been justified upon a reasonable view of the evidence presented at defendant's trial, he was not prejudiced by the untimeliness of his counsel's request for the proposed instruction. *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

Validity of Statute.

Subsection (1) of this section is not void for vagueness, nor overbroad as intruding upon constitutionally protected conduct. *State v. Sindak*, 116 Idaho 185, 774 P.2d 895 (1989), cert. denied, 493 U.S. 1076, 110 S. Ct. 1125, 107 L. Ed. 2d 1032 (1990).

18-1509A. Enticing of children over the internet — Penalties — Jurisdiction. — (1) A person aged eighteen (18) years or older shall be guilty of a felony if he or she knowingly uses the internet to solicit, seduce, lure, persuade or entice by words or actions, or both, a minor child under the age of sixteen (16) years or a person the defendant believes to be a minor

child under the age of sixteen (16) years to engage in any sexual act with or against the child where such act is a violation of chapter 15, 61 or 66, title 18, Idaho Code.

(2) Every person who is convicted of a violation of this section shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years.

(3) It shall not constitute a defense against any charge or violation of this section that a law enforcement officer, peace officer, or other person working at the direction of law enforcement was involved in the detection or investigation of a violation of this section.

(4) The offense is committed in the state of Idaho for purposes of determining jurisdiction if the transmission that constitutes the offense either originates in or is received in the state of Idaho. [I.C., § 18-1509A, as added by 2003, ch. 145, § 1, p.418.]

Compiler's notes. Section 2 of S.L. 2003, ch. 145, is compiled as § 18-8304.

Sec. to sec. ref. This section is referred to in § 18-8304.

18-1510. Providing shelter to runaway children. — (1) A person who knowingly or intentionally provides housing or other accommodations to a child seventeen (17) years of age or younger without the authority of: (a) the custodial parent or guardian of the child; (b) the state of Idaho or a political subdivision thereof; or (c) the one having legal custody of the child shall be guilty of a misdemeanor. Nothing contained in this section shall be construed to prevent the lawful detention of a minor child or the rendering of emergency aid or assistance to a minor child. It shall be an affirmative defense to the provisions of this section that the person providing housing or other accommodations to the child has notified the custodial parent or guardian or the county sheriff or city police of the child's whereabouts. It shall also be an affirmative defense to the provisions of this section that the person providing housing or other accommodations to the child notices reasonable evidence that the child has been abused by the custodial parent or guardian.

(2) A person convicted of a violation of the provisions of this section shall be punished by imprisonment for a period not in excess of six (6) months, a fine not in excess of five thousand dollars (\$5,000) or by both such fine and imprisonment. Additionally, any real property utilized in violation of the provisions of this section may be declared a public nuisance pursuant to chapter 1, title 52, Idaho Code. [I.C., § 18-1510, as added by 1989, ch. 155, § 11, p. 371.]

Compiler's notes. A former § 18-1510 which comprised S.L. 1957, ch. 197, § 5, p. 407, was repealed by S.L. 1969, ch. 325, § 11.

Section 21 of S.L. 1989, ch. 155 provided that the act should take effect January 15, 1990.

Sections 10 and 12 of S.L. 1989, ch. 155 are compiled as §§ 18-1502 and 72-102, respectively.

18-1511. Sale or barter of child for adoption or other purpose penalized — Allowed expenses. — Any person or persons who shall sell

or barter any child for adoption or for any other purpose, shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state penitentiary for not more than fourteen (14) years, or by a fine of not more than five thousand dollars (\$5,000), or by both such fine and imprisonment.

Provided however, this section shall not prohibit any person, or adoption agency from providing, in addition to legal and medical costs, reasonable maternity and living expenses during the pregnancy and for a period not to exceed six (6) weeks post partum based upon demonstrated financial need.

Any person or agency, seeking to provide financial assistance in excess of five hundred dollars (\$500) shall do so after informally submitting to a court of competent jurisdiction, a verified financial plan outlining proposed expenditures. The court may approve or amend such a proposal. Only after court approval shall assistance totaling more than five hundred dollars (\$500) become available to the birth parent. A prospective adoptive parent, or another person acting on behalf of a prospective adoptive parent, shall make payments for allowed expenses only to third party vendors, as is reasonably practical. All actual expenditures shall be presented by verified affidavit of counsel or the agency at the time of the adoption finalization.

No financial assistance to a birth parent shall exceed the sum of two thousand dollars (\$2,000) unless otherwise authorized by the court. The financial assistance contemplated by this section shall be considered a charitable gift, not subject to recovery under the terms of section 16-1515, Idaho Code. [I.C., § 18-1511, as added by 1972, ch. 336, § 1, p. 844; am. 2000, ch. 172, § 1, p. 440.]

Compiler's notes. A former section, which comprised S.L. 1959, ch. 25, § 1, p. 55, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

Cross ref. Adoption of children, § 16-1501.

Sec. to sec. ref. This section is referred to in §§ 16-1506, 33-1208 and 39-1113.

18-1512. Medical bills payment for child to be adopted or mother an exception. — Paying of medical bills, either for a child to be adopted or for the mother of such child, shall not be considered a violation of this act. [I.C., § 18-1512, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1959, ch. 25, § 2, p. 55, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

The words "this act" refer to S.L. 1972, ch. 336, generally codified as title 18 but specifically here referring to §§ 18-1511 and 18-1512.

18-1512A. Advertising for adoption — Prohibited acts. — (1) Unless the context clearly requires otherwise in this section, "advertisement" means communication by newspaper, radio, television, handbills, placards or other print, broadcast or the electronic medium.

(2) No person or entity shall cause to be published for circulation or broadcast on a radio or television station within the geographic borders of the state of Idaho an advertisement or notice of a child or children offered or wanted for adoption or shall hold himself out through such advertisement or notice as having the ability to place, locate, dispose or receive a child or

children for adoption, unless the person or entity is a duly authorized agent, contractee or employee of the department of health and welfare or an authorized children's agency or institution licensed by the department of health and welfare to care for and place children.

(3) A violation of subsection (2) of this section is a matter affecting the public interest for the purpose of applying chapter 6, title 48, Idaho Code. A violation of subsection (2) of this section is not reasonable in relation to the development and preservation of business. A violation of subsection (2) of this section constitutes an unfair or deceptive act or practice in trade or commerce for the purpose of applying chapter 6, title 48, Idaho Code.

(4) Nothing herein is intended to prohibit an attorney licensed to practice in the state of Idaho from advertising his or her ability to practice or provide services related to the adoption of children.

(5) Nothing herein is intended to prohibit physicians and other health care providers who are licensed to practice in the state of Idaho from assisting or providing natural and adoptive parents with medical care necessary to initiate and complete adoptive placements. [I.C., § 18-1512A, as added by 1988, ch. 226, § 1, p. 438; am. 2000, ch. 174, § 1, p. 442.]

18-1513. Obscene materials — Dissemination to minors — Policy.

— It is hereby declared to be the policy of the legislature to restrain the distribution, promotion, or dissemination of obscene material, or of material harmful to minors, or the performance of obscene performances, or performances harmful to minors. It is found that such materials and performances are a contributing factor to crime, to juvenile crime, and also a basic factor in impairing the ethical and moral development of our youth. [I.C., § 18-1513, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 1, p. 1025, and transferred to I.C., § 18-2104, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Obscene materials generally, §§ 18-4101 — 18-4115.

Sec. to sec. ref. This section is referred to in § 18-4106.

Collateral References. Applicability of criminal statutes relating to offenses against

children of a specified age with respect to a child who is past the anniversary date of such age. 73 A.L.R.2d 874.

Entrapment to commit offense against obscenity laws. 77 A.L.R.2d 792.

Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214; 93 A.L.R.3d 297.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297.

18-1514. Obscene materials — Definitions. — The following definitions are applicable to this act:

1. "Minor" means any person less than eighteen (18) years of age.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

3. "Sexual conduct" means any act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, the breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one who is nude or so clothed.

6. "Harmful to minors" includes in its meaning one or both of the following:

(a) The quality of any material or of any performance or of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(1) appeals to the prurient interest of minors as judged by the average person, applying contemporary community standards; and

(2) depicts or describes representations or descriptions of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse which are patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors and includes, but is not limited to, patently offensive representations or descriptions of:

(i) intimate sexual acts, normal or perverted, actual or simulated; or

(ii) masturbation, excretory functions or lewd exhibition of the genitals or genital area. Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in context in which it is used, possesses serious literary, artistic, political or scientific value for minors, according to prevailing standards in the adult community, with respect to what is suitable for minors.

(b) The quality of any material or of any performance, or of any description or representation, in whatever form, which, as a whole, has the dominant effect of substantially arousing sexual desires in persons under the age of eighteen (18) years.

7. "Material" means anything tangible which is harmful to minors, whether derived through the medium of reading, observation or sound.

8. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

9. "Promote" means to manufacture, issue, sell, give, provide, deliver, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

10. "Knowingly" means having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry. [I.C., § 18-1514, as added by 1972, ch. 336, § 1, p. 844; am. 1976, ch. 81, § 15, p. 258.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 2, p. 55 and transferred to I.C., § 18-2105, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the

present section added by S.L. 1972, ch. 336, § 1 restored the subject matter as contained in the section prior to its repeal.

The words "this act" refer to S.L. 1972, ch. 336, generally codified as title 18 but specifi-

cally here referring to §§ 18-1513 — 18-1521.

Section 14 of S.L. 1976, ch. 81 is compiled herein as § 18-4114.

Section 16 of S.L. 1976, ch. 81, read: "If any phrase, clause, sentence, section, or provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other phrase, clause, sentence, section, provision, or application of

this act which can be given effect without the invalid phrase, clause, sentence, section, provision, or application and to this end the provisions of this act are declared to be severable."

Sec. to sec. ref. This section is referred to in §§ 18-4105 and 18-4106.

Collateral References. Modern concept of obscenity. 5 A.L.R.3d 1158.

18-1515. Disseminating material harmful to minors — Defined — Penalty. — A person is guilty of disseminating material harmful to minors when:

1. He knowingly gives or makes available to a minor or promotes or possesses with intent to promote to minors, or he knowingly sells or loans to a minor for monetary consideration:

- (a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or
- (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or
- (c) Any other material harmful to minors.

2. With reference to a motion picture, show or other presentation which depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he knowingly:

- (a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or
- (b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or
- (c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or
- (d) Exhibits such motion picture, show or other presentation to a minor not for a monetary consideration; or
- (e) Gives without monetary consideration to a minor an admission ticket or pass to premises where there is exhibited or to be exhibited such motion picture, show, or other presentation.

Disseminating material harmful to minors is a misdemeanor punishable by confinement in the county jail not to exceed one (1) year, or by a fine not to exceed one thousand dollars (\$1,000), or by both such fine and jail sentence. [I.C., § 18-1515, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 3, p. 1025, and transferred to I.C., § 18-2106, effective January 1, 1972, was repealed by S.L. 1972, ch.

109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Sale of obscene matter; penalties, § 18-4103.

Sec. to sec. ref. This section is referred to in §§ 18-4106, 18-7803 and 67-6533.

18-1516. Misrepresentations — Parenthood or age — Misdemeanor. — A person is guilty of a misdemeanor when:

1. He knowingly misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of any minor to any motion picture, show, or other presentation which is harmful to minors as defined in section 18-1515, subsection 2.

2. If he is a minor and misrepresents his age for the purpose of obtaining admission to any motion picture, show, or other presentation which is harmful to minors as defined in section 18-1515, subsection 2. [I.C., § 18-1516, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 4, p. 1025, and transferred to I.C. § 18-2107, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-4106.

18-1517. Disseminating material harmful to minors — Defenses. — 1. In any prosecution for disseminating material harmful to minors, it is an affirmative defense that:

(a) The defendant had reasonable cause to believe that the minor involved was eighteen (18) years old or more, or such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was eighteen (18) years of age or older.

(b) The minor involved was accompanied by his parent or legal guardian, or by an adult and the adult represented that he was the minor's parent or guardian or an adult and signed a written statement to that effect.

(c) The defendant was the parent or guardian of the minor involved.

(d) The defendant was a bona fide school, college, university, museum or public library, or was acting in his capacity as an employee of such an organization or a retail outlet affiliated with and serving the educational purposes of such an organization. [I.C., § 18-1517, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 5, p. 1025, and transferred to I.C., § 18-2108, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-4106.

18-1517A. Hiring, employing, etc., minor to engage in certain acts — Penalty. — Every person who, with knowledge that a person is a minor under eighteen (18) years of age, or who, while in the possession of such facts that he should reasonably know that such person is a minor under eighteen (18) years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in section 18-4103, Idaho Code, is guilty of a misdemeanor. If such person has previously been convicted of a

violation of this section he shall be guilty of a felony. [I.C., § 18-1517A, as added by 1973, ch. 305, § 18, p. 655.]

Compiler's notes. Sections 17 and 19 of S.L. 1973, ch. 305 are compiled as § 18-4114 and § 23-933A.

Section 21 of S.L. 1973, ch. 305 provided for severability in the event of partial invalidity and is compiled as § 18-4115.

Section 22 of S.L. 1973, ch. 305 provided that the act should be in full force and effect on and after July 1, 1973.

18-1518. Tie-in sales of prohibited materials — Misdemeanor. —

No person shall as a condition to a sale or delivery for resale of any book, paper, magazine, periodical, or other material require that the purchaser or consignee receive for resale any article, the promotion of which is prohibited by this act. Any violation hereof is a misdemeanor. [I.C., § 18-1518, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 6, p. 1025, and transferred to I.C., § 18-2109, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

For words "this act" see compiler's note, § 18-1514.

Sec. to sec. ref. This section is referred to in §§ 18-4106 and 18-7803.

18-1519. Each prohibited item disseminated constitutes separate offense. — If more than one (1) article or item of material prohibited under this statute, is sold, given, advertised for sale, distributed commercially or promoted, in violation of the provisions of this act by the same person, each such sale, gift, advertisement, distribution, or promotion shall constitute a separate offense. [I.C., § 18-1519, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 7, p. 1025, and transferred to I.C., § 18-2110, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

For words "this act" see compiler's note, § 18-1514.

Sec. to sec. ref. This section is referred to in § 18-4106.

18-1520. District courts — Injunctions — Trial — Orders of injunction. — The district courts have jurisdiction to enjoin the sale or distribution of material harmful to minors, and to direct the seizure and destruction of the same, as hereinafter specified:

1. The prosecuting attorney of any county in which a person, firm, or corporation sells, distributes or promotes, or is about to sell, distribute or promote, or has in his possession with intent to sell, distribute or promote, or is about to acquire possession with intent to sell, distribute or promote, any material harmful to minors, may maintain an action in the name of the state of Idaho for an injunction against such person, firm, or corporation in the district court of that county to prevent the sale, distribution or promotion, or further sale, distribution, or promotion, or the acquisition or possession of any material harmful to minors.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one (1) day after joinder of issue and a decision

shall be rendered by the court within two (2) days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of the state of Idaho and against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm or corporation to cease and desist from the sale of all materials adjudged to be harmful to minors.

4. Such final order or judgment of injunction shall not enjoin or prohibit a person, firm or corporation from sale, distribution or promotion of material harmful to minors to persons other than minors, nor shall it order the seizure and destruction of material harmful to minors unless the court finds and concludes that the person, firm or corporation has been selling, distributing or promoting, or intends to sell, distribute or promote such material to minors.

5. In any action brought as herein provided the state of Idaho shall not be required to file any undertaking before the issuance of an injunction order, shall not be liable for costs, and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

6. Every person, firm, or corporation who sells, distributes, or promotes, or acquires possession with intent to sell, distribute, or promote any material harmful to minors, after the service upon him of a summons and complaint in an action brought pursuant to this section, is chargeable with knowledge of the contents thereof. [I.C., § 18-1520, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 8, p. 1025, and transferred to I.C., § 18-2111, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-4106.

Collateral References. Porno shops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

18-1521. Uniform enforcement — Abrogation of existing ordinances — Further local ordinances banned. — In order to make the application and enforcement of this act uniform throughout the state, it is the intent of the legislature to preempt, to the exclusion of city and county governments, the regulation of the sale, loan, distribution, dissemination, presentation or exhibition to a minor of material which is obscene or which is harmful to minors and depicts in whole or in part nudity, sexual conduct or sado-masochistic abuse. To that end, it is hereby declared that every city or county ordinance adopted before the effective date of this act which deals with the regulation of the sale, loan, distribution, dissemination, presentation or exhibition to a minor of material which is obscene or which is harmful to minors and depicts in whole or in part nudity, sexual conduct or sado-masochistic abuse, shall stand abrogated and unenforceable on or after such effective date; and that no city or county government shall have the power to adopt any ordinance relating to the regulation of the sale, loan,

distribution, dissemination, presentation or exhibition to a minor of material which is obscene or which is harmful to minors and depicts in whole or in part nudity, sexual conduct or sado-masochistic abuse, on or after such effective date. [I.C., § 18-1521, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, comprising S.L. 1969, ch. 325, § 9, p. 1025, and transferred to I.C., § 18-2112, effective January 1, 1972, was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-4106.

18-1522. Unauthorized school bus entry — Notice. — (1) A person shall be guilty of a misdemeanor if that person:

- (a) Enters a school bus with intent to commit a crime;
- (b) Enters a school bus and disrupts or interferes with the driver; or
- (c) Enters a school bus and refuses to disembark after being ordered to do so by the driver.

(2) School districts shall place notices at the entrance to school buses which warn against unauthorized school bus entry. [I.C., § 18-1522, as added by 1999, ch. 159, § 1, p. 437.]

18-1523. Tattooing, branding and body piercing of minors. —

(1) As used in this section:

- (a) "Body piercing" means the perforation of any human body part other than an earlobe for the purpose of inserting jewelry or other decoration or for some other nonmedical purpose;
- (b) "Branding" means a permanent mark made on human tissue by burning with a hot iron or other instrument for the purpose of decoration or for some other nonmedical purpose;
- (c) "Minor" means a person under the age of eighteen (18) years but does not include a person who is an emancipated minor; and
- (d) "Tattoo" means one (1) or more of the following but does not include any mark or design done for a medical purpose:

- (i) An indelible mark made on the body of another person by the insertion of a pigment under the skin; or
- (ii) An indelible design made on the body of another person by production of scars other than by branding.

(2) No person shall knowingly tattoo, brand or perform body piercing on any minor under the age of fourteen (14) years.

(3) No person shall knowingly tattoo, brand or perform body piercing on a minor between the ages of fourteen (14) and eighteen (18) years unless such person obtains the prior written informed consent of the minor's parent or legal guardian. The minor's parent or legal guardian shall execute the written informed consent required pursuant to this subsection in the presence of the person performing the tattooing, branding or body piercing on the minor, or in the presence of an employee or agent of such person.

(4) A person who violates this section is guilty of a misdemeanor and shall be fined not more than five hundred dollars (\$500). If there is a subsequent

violation of this section within one (1) year of the initial violation, such person shall be fined not less than five hundred dollars (\$500) and not more than one thousand dollars (\$1,000). [I.C., § 18-1523, as added by 2004, ch. 127, § 1, p. 436.]

CHAPTER 16

COMPOUNDING CRIMES

SECTION.

18-1601. Compounding felony or misdemeanor.

SECTION.

18-1602 — 18-1608. [Repealed.]

18-1601. Compounding felony or misdemeanor. — Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or promise thereof, upon any agreement or understanding to compound or conceal, such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law, in which crimes may be compromised by leave of court, is punishable as follows:

1. By imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the state prison for life.

2. By imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months where the crime was punishable by imprisonment in the state prison for any other term than for life.

3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding \$500, where the crime was a misdemeanor. [I.C., § 18-1601, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 109; R.S., R.C., & C.L., § 6518; C.S., § 8186; I.C.A., § 17-1009, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1601, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section

prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Compromise of offenses, when authorized, § 19-3401 et seq.

Collateral References. 15A Am. Jur. 2d, Compounding Crimes, § 1 et seq.

15A C.J.S., Compounding Offenses, § 1 et seq.

18-1602 — 18-1608. Bribery and corrupt influence. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-1602 — 18-1608, as added by 1971, ch. 143, § 1, effective January

1, 1972 were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972. For present law see §§ 18-1351 — 18-1358.

CHAPTER 17

CONSPIRACIES

SECTION.

18-1701. Criminal conspiracy defined.

18-1702. Mining claims — Conspiracy to usurp.

SECTION.

18-1703 — 18-1710. [Repealed.]

18-1701. Criminal conspiracy defined. — If two (2) or more persons combine or conspire to commit any crime or offense prescribed by the laws of the state of Idaho, and one (1) or more of such persons does any act to effect the object of the combination or conspiracy, each shall be punishable upon conviction in the same manner and to the same extent as is provided under the laws of the state of Idaho for the punishment of the crime or offenses that each combined to commit. [I.C., § 18-1701, as added by 1978, ch. 117, § 2, p. 268.]

Compiler's notes. Former § 18-1701, which comprised with I.C., § 18-1701, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1978, ch. 117, § 1.

Cross ref. Anti-trust law, § 48-101 et seq. Evidence necessary in conspiracy, § 19-2111.

Combination in restraint of trade, Const., Art. 11, § 18; § 48-101.

Sec. to sec. ref. This section is referred to in § 18-310.

Cited in: *Dearing v. Hockersmith*, 25 Idaho 140, 136 P. 994 (1930); *State v. Spurgeon*, 107 Idaho 175, 687 P.2d 19 (Ct. App. 1984); *State v. Keller*, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985); *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987); *State v. Brennan*, 117 Idaho 123, 785 P.2d 687 (Ct. App. 1990); *State v. Rodriguez*, 118 Idaho 957, 801 P.2d 1308 (Ct. App. 1990); *State v. Weinmann*, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992).

Evidence.

Corroborated testimony of witnesses relating conversations they had had with minor victim's grandmother, where grandmother related that her boyfriend was "interested in" and "after" the victim, was properly admitted

in the trials of the grandmother and her boyfriend for conspiracy to commit lewd conduct with a minor, as such evidence was highly probative and clearly relevant and the probative value was not substantially outweighed by the danger of unfair prejudice, particularly since it did not describe any additional sexual acts. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995); *State v. Castillo*, 127 Idaho 257, 899 P.2d 967 (1995).

The district court did not abuse its discretion in admitting minor victim's testimony in the trials of her grandmother and grandmother's boyfriend, convicted of conspiracy to commit lewd conduct with a minor, concerning two subsequent acts of sexual intercourse by the boyfriend which occurred in the grandmother's house because, pursuant to subsection (b) of IRE 404, the testimony was highly probative, explained the victim's delay in reporting, and clearly reflected a common scheme or plan to use the grandmother's influence over the victim to compel her actions, and, pursuant to this section, it was evidence of the conspiracy itself. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995); *State v. Castillo*, 127 Idaho 257, 899 P.2d 967 (1995).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Bribery.
Evidence.
Fraudulent sales.
Witnesses.

Bribery.

Person incapable of receiving bribe because not a public officer, may be guilty of conspir-

acy to commit offense of bribery with public officer. *State v. Myers*, 36 Idaho 396, 211 P. 440 (1922).

Evidence.

Acts and declarations of co-conspirators, done and made in furtherance of common design, are admissible against all other parties to conspiracy, whether done or made in their presence or with their knowledge or not.

State v. Myers, 36 Idaho 396, 211 P. 440 (1922).

Where conspiracy relates to series of crimes rather than to a single crime, evidence that one of conspirators committed a crime similar to that for which both defendants were on trial is admissible. State v. Myers, 36 Idaho 396, 211 P. 440 (1922).

Conviction can not be had on uncorroborated testimony of accomplice. State v. Gillum, 39 Idaho 457, 228 P. 334 (1924).

In preliminary hearing on charge of arson, confession of witness of criminal conspiracy between himself and defendant was admissible. In re Hollingsworth, 49 Idaho 455, 289 P. 607 (1930).

Fraudulent Sales.

Under § 18-3702 (repealed) it is a crime for debtor to sell or dispose of his property with intent to defraud, hinder, or delay his creditors, and under this section it is a crime for other parties to conspire with him and to aid and assist him in accomplishing such result. Martin v. Steele, 7 Idaho 497, 63 P. 1040 (1901).

Witnesses.

Conspiracy to secure absence of a witness. See State v. Roe, 19 Idaho 416, 113 P. 461 (1911).

Collateral References. 16 Am. Jur. 2d, Conspiracy, § 1-3, 5.

15A C.J.S., Conspiracy, § 1.

Wife's criminal responsibility for conspiracy with husband. 4 A.L.R. 282; 71 A.L.R. 1116.

Incapacity to commit offense as affecting responsibility for conspiracy to commit it. 5 A.L.R. 787; 74 A.L.R. 1110; 131 A.L.R. 1322.

Adultery or other offense which can only be committed by concerted action of parties to it, conspiracy to commit. 11 A.L.R. 196; 104 A.L.R. 1430.

Entrapment to commit crime of. 18 A.L.R. 158; 66 A.L.R. 478; 86 A.L.R. 263.

"Infamous offense," conspiracy as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1008.

Substitution or attempted substitution of another for one under sentence as a criminal offense. 28 A.L.R. 1381.

Married woman's liability for conspiracy with husband. 71 A.L.R. 1126.

Prosecution or conviction of one party to alleged conspiracy as affected by disposition of case against other parties. 72 A.L.R. 1180; 91 A.L.R.2d 700.

Merger of conspiracy in completed offense. 75 A.L.R. 1411.

Woman who connives or consents to own transportation for immoral purpose, responsibility of, as a coconspirator. 84 A.L.R. 376.

Usury or excessive interest, taking of, as subject of criminal conspiracy. 89 A.L.R. 830.

Market manipulation of securities, criminal liability for. 115 A.L.R. 274.

Incapacity personally to commit the offense as affecting responsibility as conspirator. 131 A.L.R. 1327.

Conspiring to violate rationing regulation as merged in completed offense. 157 A.L.R. 1473; 158 A.L.R. 1489.

Right of accused to bill of particulars. 5 A.L.R.2d 444.

Criminal conspiracy between spouses. 46 A.L.R.2d 1275; 74 A.L.R.2d 838.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 A.L.R.2d 622.

When the statute of limitations begin to run against civil action or criminal prosecution for conspiracy. 62 A.L.R.2d 1369.

Criminal conspiracy as to gambling. 91 A.L.R.2d 1148.

Admissibility of statements of coconspirators made at the termination of conspiracy and outside accused's presence. 4 A.L.R.3d 671.

Jurisdiction to prosecute conspirator who is not in state at time of substantive criminal act, for offense committed pursuant to conspiracy. 5 A.L.R.3d 887.

Actionability of conspiracy to give or to procure false testimony or other evidence. 31 A.L.R.3d 1423.

Comment note on impossibility of consummation of substance of crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

Comment note on necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators. 46 A.L.R.3d 1148.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Criminal liability for wrongfully obtaining unemployment benefits. 80 A.L.R.3d 1280.

Right of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged. 5 A.L.R.4th 1128.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments. 22 A.L.R.4th 534.

18-1702. Mining claims — Conspiracy to usurp. — In all cases where two (2) or more persons associate themselves together for the purpose

of obtaining the possession of any lode, gulch or placer claim, then in the actual possession of another, by force and violence, or by stealth, and proceed to carry out such purpose by making threats against the party or parties in possession, or enter upon such lode or mining claim for the purpose aforesaid, or enter upon or into any lode, gulch, placer claim, quartz mill or other mining property, or, not being upon such property, make any threats, or make use of any language, signs or gestures calculated to intimidate any person or persons at work on said property from continuing to work thereon or therein, or to intimidate others from engaging to work thereon or therein, every such person so offending is guilty of [a] misdemeanor. [I.C., § 18-1702, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1885, p. 30, § 3; R.S., R.C., & C.L., § 6541; C.S., § 8205; I.C.A., § 17-1028, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1702, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

The bracketed word "a" was inserted by the compiler.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: Pettibone v. United States, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419 (1893).

18-1703 — 18-1710. Falsification in official matters. [Repealed.]

Compiler's notes. These sections, which comprised I.C, §§ 18-1703 — 18-1710, as added by 1971, ch. 143, § 1, p. 630, effective

January 1, 1972 were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

CHAPTER 18

CONTEMPTS

SECTION.
18-1801. Criminal contempts.
18-1802 — 18-1809. [Repealed.]

18-1801. Criminal contempts. — Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court and directly tending to interrupt its proceedings or to impair the respect due to its authority.
2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury, while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.
3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.
4. Wilful disobedience of any process or order lawfully issued by any court.
5. Resistance wilfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question. [I.C., § 18-1801, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 8, p. 296.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6529; C.S., § 8197; I.C.A., § 17-1020, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1801, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 7 of S.L. 1994, ch. 131 contained repeals and § 9 is compiled as § 25-3511.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Criminal acts punishable as crimes though also punishable as contempts, §§ 18-105, 18-302.

Rule to sec. ref. This section is referred to in I.C.R. 42.

Cited in: Dutton v. District Court, 95 Idaho 720, 518 P.2d 1182 (1974).

ANALYSIS

Erroneous orders.

Inherent power of court.

Jurisdiction of probate court.

Review.

Void orders.

Erroneous Orders.

Where witness refused to produce his notes, when ordered to by court, on the grounds that they were not used during trial to refresh his memory, he is guilty of contempt under this section for wilful disobedience of an order lawfully issued by the court, regardless of whether the interpretation by the court of former § 9-1204 was correct or erroneous. *Barnett v. Reed*, 93 Idaho 319, 460 P.2d 744 (1969).

Inherent Power of Court.

Inherent power of court of record to punish contempts can not be abridged by legislature. *McDougall v. Sheridan*, 23 Idaho 191, 128 P. 954 (1913).

Jurisdiction of Probate Court.

Probate courts have jurisdiction of criminal contempts, but jurisdiction must be exercised in accordance with provisions of the statute. Where alleged contempt is not committed in the immediate view and presence of court or judge, no jurisdiction is acquired until affidavit has been presented as required by § 7-

603. *Harkness v. Hyde*, 31 Idaho 784, 176 P. 885 (1918).

Review.

While the order holding a person in contempt under this section is not appealable under § 7-614, the writ of review is a proper method by which actions of a court in a contempt proceeding can be reviewed. *Barnett v. Reed*, 93 Idaho 319, 460 P.2d 744 (1969).

Void Orders.

Violation of an order which is void because of lack of jurisdiction of the court to make it, is not a "contempt of court," and no one is under compulsion to obey it. *State v. McNichols*, 62 Idaho 616, 115 P.2d 104 (1941).

Collateral References. 17 Am. Jur. 2d, Contempt, § 1 et seq.

17 C.J.S., Contempt, § 1 et seq.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous. 12 A.L.R.2d 1059.

Bail jumping after conviction, failure to surrender or to appear for sentencing, and the like, as contempt. 34 A.L.R.2d 1100.

Limitations statute applicable to criminal contempt proceedings. 38 A.L.R.2d 1131.

Necessity of affidavit or sworn statement as foundation for constructive contempt. 41 A.L.R.2d 1263.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 A.L.R.2d 600; 37 A.L.R.4th 1004.

Published article or broadcast as direct contempt of court. 69 A.L.R.2d 676.

Right of state in criminal contempt cases to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions. 72 A.L.R.2d 431.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer. 76 A.L.R.2d 262.

Contempt proceedings against prosecution witness for refusal to disclose identity of informer. 76 A.L.R.2d 306.

Court's power to punish for contempt a child within the age group subject to jurisdiction of juvenile court. 77 A.L.R.2d 1004.

Use of affidavits to establish contempt. 79 A.L.R.2d 657.

Admissibility, in contempt proceedings against witness, of evidence of incriminating nature of question as to which he invoked privilege against self-incrimination. 88 A.L.R.2d 463.

Separate contempt punishments on successive refusals to respond to same or similar questions. 94 A.L.R.2d 1246.

False or inaccurate report of judicial proceedings as contempt. 99 A.L.R.2d 440.

Circumstances under which one court can punish a contempt against another court. 99 A.L.R.2d 1100.

Delay in adjudication of contempt committed in the actual presence of court as affecting court's power to punish contemtor. 100 A.L.R.2d 439.

Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt. 8 A.L.R.3d 657.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 A.L.R.3d 650.

Prejudicial effect of holding accused in contempt of court in presence of jury. 29 A.L.R.3d 1399.

Appealability of contempt adjudication or conviction. 33 A.L.R.3d 448.

Contempt adjudication or conviction as sub-

ject to review other than by appeal or writ of error. 33 A.L.R.3d 589.

Defense of entrapment in contempt proceedings. 41 A.L.R.3d 418.

Right to counsel in contempt proceedings. 52 A.L.R.3d 1002.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court. 54 A.L.R.3d 1242.

Picketing court or judge as contempt. 58 A.L.R.3d 1297.

Assault on attorney as contempt. 61 A.L.R.3d 500.

Addressing allegedly insulting remarks to court during course of trial as contempt, by attorney. 68 A.L.R.3d 273.

Refusal to answer questions before state grand jury as direct contempt of court. 69 A.L.R.3d 501.

Affidavit or motion for disqualification of judge as contempt. 70 A.L.R.3d 797.

Power of court to impose standard of personal appearance or attire. 73 A.L.R.3d 353.

18-1802 — 18-1809. Obstructing governmental operations. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-1802 — 18-1809, as added by 1971, ch. 143, § 1, p. 630, effective

January 1, 1972 were repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

CHAPTER 19

CORPORATIONS

SECTION.

18-1901. Fictitious stock subscription.

18-1902. Exhibition of false papers to public officers.

18-1903. Use of false name in prospectus.

18-1904. Illegal dividends and reductions of capital.

18-1905. Falsification of corporate books.

18-1906. Fraudulent reports by officers.

18-1907. Refusal to permit stockholder to inspect records.

SECTION.

18-1908. Directors deemed to have knowledge of affairs.

18-1909. Director present at meeting — Assent to illegal acts.

18-1910. Director not present at meeting — Assent to illegal acts.

18-1911. Foreign corporations subject to chapter.

18-1912. Director defined.

18-1901. Fictitious stock subscription. — Every person who signs the name of a fictitious person to any subscription for, or agreement to take, stock in any corporation existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not the means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor. [I.C., § 18-1901, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7114; C.S., § 8498; I.C.A., § 17-4001, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1901, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Proceedings against corporations, §§ 19-3601 — 19-3608.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: *Smith v. Rader*, 31 Idaho 423, 173 P. 970 (1918).

Collateral References. 18B Am. Jur. 2d, Corporations, §§ 1893 — 1896.

18 C.J.S., Corporations, § 196 et seq.

What amounts to participation by corporate officer or agent in the illegal issuance of security, in order to impose liability upon him under state securities regulations. 44 A.L.R.3d 588.

18-1902. Exhibition of false papers to public officers. — Every officer, agent or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board, with intent to deceive such officer or board in respect thereto, is guilty of a misdemeanor. [I.C., § 18-1902, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7115; C.S., § 8499; I.C.A., § 17-4002, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1902, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective

April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-1903. Use of false name in prospectus. — Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in, any prospectus, circular or other advertisement or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor. [I.C., § 18-1903, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7116; C.S., § 8500; I.C.A., § 17-4003, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-1903, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective

April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-1904. Illegal dividends and reductions of capital. — Every director of any stock corporation who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either:

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any note or other evidence of debt in payment of any instalment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him or his stock; or,

5. To receive from any other stock corporation, in exchange for the shares, notes, bonds or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds or other evidences of debt issued by such other corporation;

Is guilty of a misdemeanor. [I.C., § 18-1904, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7117; C.S., § 8501; I.C.A., § 17-4004, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-1905. Falsification of corporate books. — Every director, officer or agent of any corporation or joint stock association who knowingly receives or possesses himself of any property of such corporation or association otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent or member of any corporation or joint stock association who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes or concurs in making, any false entries, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three (3) nor more than ten (10) years, or by imprisonment in a county jail not exceeding one (1) year or a fine not exceeding \$500, or by both such fine and imprisonment. [I.C., § 18-1905, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7120; C.S., § 8504; I.C.A., § 17-4005, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: Smith v. Rader, 31 Idaho 423, 173 P. 970 (1918).

ANALYSIS

Accurate entry of fraudulent transaction.
Constitutionality.

In general.

Willful and malicious conversion.

Accurate Entry of Fraudulent Transaction.

Granting of defendants' motion for an advisory instruction of acquittal was proper, where the evidence showed the injection of capital consisting of real property into a corporation, entry thereof in the corporate books in an account entitled "Real Estate Owned," transfer of a portion of the injected capital (not in fact income) to an account entitled "Other Fees and Income" with the "purpose" noted "To reflect injected capital taken into income to offset dividends," and payment of dividends to shareholders out of this transferred portion; and where the evidence further showed that these entries did in fact accurately reflect the transactions which occurred. *State v. Grow*, 93 Idaho 588, 468 P.2d 320 (1970).

Constitutionality.

This section does not violate the Fourteenth Amendment to the United States Constitution because it allows for sentencing discre-

tion and not charging discretion. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

In General.

Where an entry reflects what has actually taken place it is not false. *State v. Grow*, 93 Idaho 588, 468 P.2d 320 (1970).

Willful and Malicious Conversion.

Debtor was charged with and pleaded guilty to a violation of this section. However, claimants attempting to pierce the corporate veil in bankruptcy proceedings accused debtor of willful and malicious conversion of property. The guilty plea for falsification of corporate records was not inconsistent with debtor's personal liability to the claimants for willful and malicious conversion, and therefore, trustee failed to rebut the presumption that claimants' claims were valid. *In re Hawkins*, 144 Bankr. 481 (Bankr. D. Idaho 1992).

18-1906. Fraudulent reports by officers. — Every director, officer or agent of any corporation or joint stock association who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, is guilty of a misdemeanor. [I.C., § 18-1906, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7121; C.S., § 8505; I.C.A., § 17-4006 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: *State v. Paulsen*, 21 Idaho 686, 123 P. 588 (1912).

18-1907. Refusal to permit stockholder to inspect records. — Every officer or agent of any corporation having or keeping an office within this state who has in his custody or control any book, paper or document of such corporation and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor. [I.C., § 18-1907, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7122; C.S., § 8506; I.C.A., § 17-4007 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

ANALYSIS

Construction.
Copies of records.

Construction.

This section and C.S., §§ 4758, 4759 (now repealed), have adopted and extended the common-law rule and make the right of inspection of books of corporation by members

absolute. *Pfirman v. Success Mining Co.*, 30 Idaho 468, 166 P. 216 (1917). denied stockholders. *Pfirman v. Success Mining Co.*, 30 Idaho 468, 166 P. 216 (1917).

Copies of Records.

Right to make copies of records can not be

18-1908. Directors deemed to have knowledge of affairs. — Every director of a corporation or joint stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. [I.C., § 18-1908, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7123; C.S., § 8507; I.C.A. § 17-4008 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. What amounts to participation by corporate officer or agent in the illegal issuance of security, in order to impose liability upon him under state securities regulations. 44 A.L.R.3d 588.

18-1909. Director present at meeting — Assent to illegal acts. — Every director of a corporation or a joint stock association who is present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors. [I.C., § 18-1909, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7124; C.S., § 8508; I.C.A., § 17-4009 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-1910. Director not present at meeting — Assent to illegal acts. — Every director of a corporation or joint stock association, although not present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors. [I.C., § 18-1910, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7125; C.S., § 8509; I.C.A., § 17-4010 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-1911. Foreign corporations subject to chapter. — It is no defense to a prosecution for a violation of the provisions of this chapter that the corporation was one created by the laws of another state, territory, government or country, if it was one carrying on business or keeping an

office therefor within this state. [I.C., § 18-1911, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7126; C.S., § 8150; I.C.A., § 17-4011 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-1912. Director defined. — The term “director” as used in this chapter embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law. [I.C., § 18-1912, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7127; C.S., § 8511; I.C.A., § 17-4012 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Construction of policy or bond indemnifying directors or officers of corporations where expenses incurred in defending actions run against them in their capacity as such. 49 A.L.R.3d 1250.

CHAPTER 20

CRIMINAL SOLICITATION

SECTION.

- 18-2001. Definition of solicitation.
- 18-2002. Innocence or incapacity of person solicited — No defense.
- 18-2003. Renunciation of criminal purpose.
- 18-2004. Punishment for criminal solicitation.

SECTION.

- 18-2005. Solicitation to halt or impede lawful forest, mining or agricultural practices.

18-2001. Definition of solicitation. — A person is guilty of criminal solicitation to commit a crime if with the purpose of promoting or facilitating its commission he solicits, importunes, commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish complicity in its commission or attempted commission. [I.C., § 18-2001, as added by 1982, ch. 270, § 1, p. 701.]

Compiler's notes. A former chapter 20, which comprised S.L. 1917, ch. 145, §§ 1-4, p. 459; C.L., §§ 7179 — 7179c; S.L. 1919, ch. 136, § 1, p. 432; C.S., §§ 8580 — 8583; S.L. 1925, ch. 51, § 1, p. 75; I.C.A., §§ 17-4401 — 17-4404 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A second former chapter 20 which comprised I.C., §§ 18-2001 — 18-2013, as added by 1971, ch. 143, § 1 was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972.

A third former chapter 20 which comprised §§ 18-2001 — 18-2004 as added by S.L. 1972,

ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

Cross ref. Liability for crime, principals and accessories, §§ 18-201 — 18-216.

Sec. to sec. ref. This section is referred to in § 18-310.

Cited in: *State v. Johnson*, 120 Idaho 408, 816 P.2d 364 (Ct. App. 1991); *State v. Thompson*, 136 Idaho 322, 33 P.3d 213 (Ct. App. 2001).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 181-183, 185.

22 C.J.S., Criminal Law, §§ 114-126.

18-2002. Innocence or incapacity of person solicited — No defense. — It is no defense to a prosecution for criminal solicitation that the person solicited could not be guilty of the crime solicited owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct solicited or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the crime in question. [I.C., § 18-2002, as added by 1982, ch. 270, § 1, p. 701.]

Compiler's notes. Former § 18-2002 was repealed. See Compiler's notes, § 18-2001.

18-2003. Renunciation of criminal purpose. — It is an affirmative defense that the defendant, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. [I.C., § 18-2003, as added by 1982, ch. 270, § 1, p. 701.]

Compiler's notes. Former § 18-2003 was repealed. See Compiler's notes, § 18-2001.

18-2004. Punishment for criminal solicitation. — Every person who is found guilty of criminal solicitation to commit a crime is punishable in the same manner and to the same extent as for an attempt to commit such crime. [I.C., § 18-2004, as added by 1982, ch. 270, § 1, p. 701.]

Compiler's notes. Former § 18-2004 was repealed. See Compiler's notes, § 18-2001.

18-2005. Solicitation to halt or impede lawful forest, mining or agricultural practices. — Any person who solicits any other person, or conspires with any other person to commit any crime against property or person with the specific intent to halt, impede, obstruct or interfere with the lawful management, cultivation or harvesting of trees or timber or with the lawful management or operations of agricultural or mining industries, if the act is performed to effect the object of the solicitation or conspiracy, shall be guilty of a felony; provided however, that any person who solicits any other person or conspires with any other person to stage a peaceful demonstration which is not designed, planned, or intended to involve the commission of any crime against property or person shall not be guilty of any crime under the provision of this section. [I.C., § 18-2005, as added by 1994, ch. 214, § 1, p. 672; am. 1997, ch. 222, § 1, p. 654.]

CHAPTER 21

CRUELTY TO ANIMALS

[AMENDED AND REDESIGNATED OR REPEALED]

SECTION.

18-2101 — 18-2111. [Amended and Redesignated.]

18-2112. [Repealed.]

18-2113, 18-2114. [Amended and Redesignated.]

SECTION.

18-2115. [Repealed.]

18-2116. [Amended and Redesignated.]

18-2101 — 18-2111. [Amended and Redesignated.]

Compiler's notes. Former §§ 18-2101 — 18-2111 were amended and redesignated as §§ 25-3503 — 25-3513, respectively, by §§ 3 — 13 of S.L. 1994, ch. 346.

Another former § 18-2101, which comprised Cr. & P. 1864, § 142; R.S., R.C., & C.L., § 7152; C.S., § 8541; I.C.A., § 17-4201 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2101, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-2503.

Another former § 18-2102, which comprised Cr. & P. 1864, § 143; R.S. & R.C., § 7153; am. 1909, p. 175, § 1; reen. C.L., § 7153; C.S., § 8542; I.C.A., § 17-4202, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2102, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3504.

Another former § 18-2103, which comprised R.C., § 7153a, as added by 1909, p. 175, § 2; reen. C.L., § 7153a; C.S., § 8543; I.C.A., § 17-4203 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2103, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3505.

Another former § 18-2104, which comprised R.C., § 7153b, as added by 1909, p. 175, § 2; reen. C.L., § 7153b; C.S., § 8544; I.C.A., § 17-4204 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3506.

Another former § 18-2105, which comprised R.C., § 7153c, as added by 1909, p. 175, § 2; reen. C.L., § 7153c; C.S., § 8545; I.C.A., § 17-4205 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, I.C., § 18-2105, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3507.

Another former § 18-2106, which comprised 1883, p. 63, § 4; R.S., R.C., & C.L., § 6958; C.S., § 8372; I.C.A., § 17-4206 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3508 (now repealed).

Another former § 18-2107, which comprised R.C., § 7153d, as added by 1909, p. 175, § 2; reen. C.L., § 7153d; C.S., § 8546; I.C.A., § 17-4207 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3509.

Another former § 18-2108, which comprised R.C., § 7153e, as added by 1909, p. 175, § 2; reen. C.L., § 7153e; C.S., § 8547; I.C.A., § 17-4208 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3510.

Another former § 18-2109, which comprised R.C., § 7153f, as added by 1909, p. 175, § 2; reen. C.L., § 7153f; C.S., § 8548; I.C.A., § 17-4209 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3511.

Another former § 18-2110, as added by 1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

Another former § 18-2111, which comprised R.C., § 7153h, as added by 1909, p. 175, § 2; reen. C.L., § 7153h; C.S., § 8550;

I.C.A., § 17-4211 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal. See § 25-3513.

18-2112. Terms defined. [Repealed.]

Compiler's notes. Another former § 18-2112, which comprised R.C., § 7153i, as added by 1909, p. 175, § 2; compiled and reen. C.L., § 7153j; C.S., § 8551; I.C.A., § 17-4212 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Another former § 18-2112, which comprised I.C., § 18-2112, as added by 1972, ch. 336, § 1, p. 844, was amended by S.L. 1994, ch. 131, § 11, effective July 1, 1994 and was repealed by S.L. 1994, ch. 346, § 14, effective July 1, 1994.

18-2113, 18-2114. [Amended and Redesignated.]

Compiler's notes. Former §§ 18-2113 and 18-2114 were amended and redesignated as §§ 25-3515 and 25-3516, respectively, by §§ 16 and 17 of S.L. 1994, ch. 346.

Another former § 18-2113, which comprised R.C., § 7153j, as added by 1909, p. 175, § 2; reen. C.L., § 7153j; C.S., § 8552; I.C.A., § 17-4213 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3515.

Another former § 18-2114 which comprised R.C., § 7153k, as added by 1909, p. 175, § 2; reen. C.L., § 7153k; C.S., § 8553; I.C.A., § 17-4214 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Section 18-2114 as added by 1972, ch. 336, § 1 which was identical to the section repealed in 1971 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-2115. [Amended and Redesignated.]

Compiler's notes. Former § 18-2115, which comprised I.C., § 18-2115, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 131, § 12, effective July 1, 1994 and was amended and redesignated as § 25-3517 by S.L. 1994, ch. 346, § 18, effective July 1, 1994.

Another former § 18-2115, which comprised R.S., § 7131l, as added by 1909, p. 175, § 2; reen. C.L., § 7153l; C.S., § 8554; I.C.A., § 17-4215 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2116. [Amended and Redesignated.]

Compiler's notes. Former § 18-2116 was amended and redesignated as § 25-3518 by § 19 of S.L. 1994, ch. 346.

Another former § 18-2116, which comprised 1883, p. 63, § 3; R.S., R.C., & C.L., § 7155; C.S., § 8555; I.C.A., § 17-4216 was

repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. See § 25-3518.

CHAPTER 22

COMPUTER CRIME

SECTION.

18-2201. Definitions.

18-2202. Computer crime.

SECTION.

18-2203 — 18-2206. [Repealed.]

18-2201. Definitions. — As use [used] in this chapter:

(1) To “access” means to instruct, communicate with, store data in,

retrieve data from or otherwise make use of any resources of a computer, computer system, or computer network.

(2) "Computer" means, but is not limited to, an electronic device which performs logical, arithmetic, or memory functions by the manipulations of electronic or magnetic impulses, and includes all input, output, processing, storage, software, or communication facilities which are connected or related to such a device in a system or network.

(3) "Computer network" means, but is not limited to, the interconnection of communication lines (including microwave or other means of electronic communication) with a computer through remote terminals, or a complex consisting of two (2) or more interconnected computers.

(4) "Computer program" means, but is not limited to, a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system.

(5) "Computer software" means, but is not limited to, computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(6) "Computer system" means, but is not limited to, a set of related, connected or unconnected, computer equipment, devices, and software.

(7) "Property" includes, but is not limited to, financial instruments, information, including electronically produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value.

(8) "Services" include, but are not limited to, computer time, data processing, and storage functions. [I.C., § 18-2201, as added by 1984, ch. 68, § 1, p. 129.]

Compiler's notes. Former §§ 18-2201 and 18-2202 which comprised I.C., §§ 18-2201 — 18-2202 as added by S.L. 1972, ch. 336, § 1 were repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

The words in parentheses so appeared in the law as enacted.

The bracketed word "used" was inserted by the compiler.

18-2202. Computer crime. — (1) Any person who knowingly accesses, attempts to access or uses, or attempts to use any computer, computer system, computer network, or any part thereof for the purpose of: devising or executing any scheme or artifice to defraud; obtaining money, property, or services by means of false or fraudulent pretenses, representations, or promises; or committing theft; commits computer crime.

(2) Any person who knowingly and without authorization alters, damages, or destroys any computer, computer system, or computer network described in section 18-2201, Idaho Code, or any computer software, program, documentation, or data contained in such computer, computer system, or computer network commits computer crime.

(3) Any person who knowingly and without authorization uses, accesses, or attempts to access any computer, computer system, or computer network described in section 18-2201, Idaho Code, or any computer software,

program, documentation or data contained in such computer, computer system, or computer network, commits computer crime.

(4) A violation of the provisions of subsections (1) or (2) of this section shall be a felony. A violation of the provisions of subsection (3) of this section shall be a misdemeanor. [I.C., § 18-2202, as added by 1984, ch. 68, § 1, p. 129.]

Compiler's notes. Former § 18-2202 was repealed. See Compiler's notes, § 18-2201.

Evidence.

State did not provide substantial evidence proving each element of defendant's alleged crime beyond a reasonable doubt; the evidence on the computer database was avail-

able to defendant from other sources before her departure from the insurance agency, and the State's own evidence showed that defendant likely had no ability to access the computer database after she left the agency. *State v. Hargrove*, 138 Idaho 632, 67 P.3d 111 (Ct. App. 2003).

18-2203 — 18-2206. Duels. [Repealed.]

Compiler's notes. Former §§ 18-2203 — 18-2206 which comprised I.C., §§ 18-2203 — 18-2206 as added by S.L. 1972, ch. 336, § 1

were repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

CHAPTER 23

ELECTIONS

SECTION.

- 18-2301. Official neglect or malfeasance.
- 18-2302. False swearing as to qualifications as voter.
- 18-2303. Refusal to be sworn or to answer questions.
- 18-2304. Procuring illegal votes.
- 18-2305. Intimidation; corruption and frauds.
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SECTION.

- 18-2312. Aiding and abetting election offenses.
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- 18-2321. Fraudulent permission of registration.
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18-2301. Official neglect or malfeasance. — Every person charged with the performance of any duty, under the provisions of any law of this state relating to elections, who wilfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment for such acts or omissions is prescribed by this Code, punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the state prison not exceeding five (5) years, or by both and shall in addition thereto, and regardless of whether or not criminal prosecution is undertaken, be subject to removal from office as provided in title 19, chapter 41, Idaho Code. [I.C., 18-2301, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1885, p. 106, § 33; R.S., R.C., & C.L., § 6354; C.S., § 8096; I.C.A., § 17-401 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2301, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Arrest, electors privileged from during attendance on elections, § 34-401.

Campaign contributions and expenditures,

violation of law regarding, penalties, §§ 67-6625, 67-6625A.

Contested elections, refusal of witness to attend and testify or produce books and documents, misdemeanor, §§ 34-2110, 34-2111.

Initiative and referendum elections, §§ 34-1814 — 34-1822.

Placing election posters on property without permission, § 18-7029.

Recall elections, § 34-1714.

Removal of civil officers, § 19-4101 et seq.

Collateral References. 25 Am. Jur. 2d, Elections, § 197 et seq.

26 Am. Jur. 2d, Elections, § 469.

29 C.J.S., Elections, § 323 et seq.

Sec. to sec. ref. This chapter is referred to in §§ 34-2001 and 34-2101.

18-2302. False swearing as to qualifications as voter. — Every person who, upon his right to vote being challenged at any election held under the laws of this state, wilfully, corruptly and falsely swears touching his qualifications as a voter, is guilty of perjury. [I.C., § 18-2302, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1885, p. 106, § 43; R.S., R.C., & C.L., § 6489; C.S., § 8171; I.C.A., § 17-917 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2302, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for perjury, § 18-5409.

Collateral References. Incomplete, misleading, or unresponsive but literally true statement as perjury. 69 A.L.R.3d 993.

Perjury conviction as affected by notary's nonobservance of formalities where administration of oath to affiant. 80 A.L.R.3d 278.

18-2303. Refusal to be sworn or to answer questions. — Every person who, after being required by the board of judges at any election, refuses to be sworn, or who, after being sworn, refuses to answer any pertinent question propounded by such board, touching his right, or the right of any other person, to vote, is guilty of a misdemeanor. [I.C., § 18-2303, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6355; C.S., § 8097; I.C.A., § 17-402 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2303, as added by 1971, ch. 143, § 1. However, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. Inferences arising from refusal of witness other than accused to answer question on the grounds that answer would tend to incriminate him. 24 A.L.R.2d 895.

Sufficiency of witness' claim of privilege against self-incrimination. 51 A.L.R.2d 1178.

18-2304. Procuring illegal votes. — Every person who procures, aids, assists, counsels or advises another to give or offer his vote at any election,

knowing that the person is not qualified to vote, is guilty of a misdemeanor. [I.C., § 18-2304, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 1; R.S., R.C., & C.L., § 6358; C.S., § 8100; I.C.A., § 17-405 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2304, as added by 1971, ch. 143, § 1. How-

ever, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2305. Intimidation, corruption and frauds. — Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever, to awe, restrain, hinder or disturb any elector in the free exercise of the right of suffrage, or furnishes any elector wishing to vote, who can not read, with a ticket, informing or giving such elector to understand that it contains a name written or printed thereon different from the name which is written or printed thereon, or defrauds any elector at any such election, by deceiving and causing such elector to vote for a different person, for any office, than he intended or desired to vote for; or who, being officer, judge, or clerk of any election, while acting as such, induces, or attempts to induce, any elector, either by menace or reward, or promise thereof, to vote differently from what such elector intended or desired to vote, is guilty of a misdemeanor. [I.C., § 18-2305, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 1; R.S., R.C., & C.L., § 6364; C.S., § 8106; I.C.A., § 17-411 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2305, as added by 1971, ch. 143, § 1. How-

ever, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2306. Illegal voting or interference with election. — Every person not entitled to vote, who fraudulently votes, and every person who votes more than once at any one election, or knowingly hands in two (2) or more tickets folded together, or changes any ballot after the same has been deposited in the ballot box, or adds, or attempts to add, any ballot to those legally polled at any election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted, or adds to or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election; or carries away or destroys, or attempts to carry away or destroy, any poll list, or ballots, or ballot box, for the purpose of breaking up or invalidating such election, or wilfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being

fairly held and lawfully conducted, is guilty of a felony. [I.C., § 18-2306, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 2; R.S., R.C., & C.L., § 6356; C.S., § 8098; I.C.A., § 17-403 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2306, as added by 1971, ch. 143, § 1. How-

ever, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-2307. Attempting to vote when not qualified, or to repeat voting. — Every person not entitled to vote, who fraudulently attempts to vote, or who, after being entitled to vote, attempts to vote more than once at any election, is guilty of a misdemeanor. [I.C., § 18-2307, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 2; R.S., R.C., & C.L., § 6357; C.S., § 8099; I.C.A., § 17-404 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and substituted therefor was a section comprising I.C., § 18-2307, as added by 1971, ch. 143, § 1. How-

ever, the latter section was repealed by S.L. 1972, ch. 109, § 1, effective April 1, 1972 and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal by S.L. 1971, ch. 143, § 5.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2308. Attempt of officer to ascertain vote. — Every officer, judge, or clerk of an election, who, previous to putting the ballot of an elector in the ballot box, attempts to find out any name on such ballot, or who opens, or suffers the folded ballot of any elector which has been handed in, to be opened or examined previous to putting the same into the ballot box, or who makes, or places any mark or device on any folded ballot, with a view to ascertain the name of any person for whom the elector has voted, or who, without the consent of the elector, discloses the name of any person which such officer, judge, or clerk has fraudulently or illegally discovered to have been voted for by such elector, is punishable by fine of not less than fifty dollars nor more than \$500. [I.C., § 18-2308, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 3; R.S., R.C., & C.L., § 6360; C.S., § 8102; I.C.A., § 17-407 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-2312.

18-2309. Officers attempting to change result. — Every officer or clerk of election who aids in changing or destroying any poll list, or in placing any ballots in the ballot box, or taking any therefrom, or adds, or attempts to add, any ballots to those legally polled at such election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted or adds to or mixes with, or attempts to add to or mix with the ballots polled any other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election, or allows another to do so when in his power to

prevent it, or carries away or destroys, or knowingly allows another to carry away or destroy, any poll list, ballot box or ballots lawfully polled, is guilty of a felony. [I.C., § 18-2309, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 4; R.S., R.C., & C.L., § 6359; C.S., § 8101; I.C.A., § 17-406 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Sec. to sec. ref. This section is referred to in § 18-2312. ~

18-2310. Forging or counterfeiting returns. — Every person who forges or counterfeits returns of an election purporting to have been held at a precinct, town, or ward where no election was in fact held, or wilfully substitutes forged or counterfeit returns of election in the place of the true returns for a precinct, town, or ward where an election was actually held, is guilty of a felony. [I.C., § 18-2310, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 4; R.S., R.C., & C.L., § 6361; C.S., § 8103; I.C.A., § 17-408 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Sec. to sec. ref. This section is referred to in § 18-2312.

18-2311. Adding to or subtracting from votes. — Every person who wilfully adds to or subtracts from the votes actually cast at an election in any returns, or who alters such returns, is guilty of a felony. [I.C., § 18-2311, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 4; R.S., R.C., & C.L., § 6362; C.S., § 8104; I.C.A., § 17-409 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-2312. Aiding and abetting election offenses. — Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sections, is punishable by imprisonment in the county jail for the period of six months, or in the state prison not exceeding two (2) years. [I.C., § 18-2312, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6363; C.S., § 8105; I.C.A., § 17-410 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Aiding and abetting violation of election laws, criminal responsibility for. 5 A.L.R. 786; 74 A.L.R. 1110; 131 A.L.R. 1322.

18-2313. Riotous conduct and interference with election. — Any person who wilfully disturbs, or is guilty of any riotous conduct at or near, any election place or voting precinct, with intent to disturb the same, or interferes with the access of the electors to the polling place, or in any

manner, with the free exercise of the election franchise of the voters, or any voter there assembled, or disturbs or interferes with the canvassing of the votes, or with the making of the returns, is guilty of a misdemeanor. [I.C., § 18-2313, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1881, p. 257, § 5; R.S., R.C., & C.L., § 6365; C.S., § 8107; I.C.A., § 17-412 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2314. Betting on elections. — Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor. [I.C., § 18-2314, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6366; C.S., § 8108; I.C.A., § 17-413 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2315. Election offenses not otherwise provided for. — Every person who wilfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violation is prescribed by law, punishable by fine not exceeding \$1,000, or by imprisonment in the state prison not exceeding five (5) years, or by both. [I.C., § 18-2315, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6367; C.S., § 8109; I.C.A., § 17-414 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Recital of, or ref-

erence to, the offense in pronouncing sentence or judgment for violation of election laws. 14 A.L.R. 998.

"Infamous offense," elective franchise as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1009.

18-2316. Tampering with certificates of nomination or ballots. — No person shall falsely make, or make oath to, or fraudulently deface, or fraudulently destroy, any certificate of nomination, or any part thereof, or file, or receive for filing, any certificate of nomination, or letter of withdrawal, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination which has been duly filed, or any part thereof, or wilfully delay the delivery of any ballots, or forge or falsely make the official indorsement on the ballot, or wilfully destroy any ballot. Every person violating any of the provisions of this section shall be deemed guilty of a felony, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by imprisonment in the penitentiary for a period of not less than one year nor more than five years. [I.C., § 18-2316, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 2; reen. 1899, p. 27, § 2; reen. R.C., & C.L., § 6369; C.S. § 8110; I.C.A., § 17-415 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2317. Destroying or defacing supplies. — No person shall, during the election, remove or destroy any of the supplies or conveniences placed in the booths or compartments for the purpose of enabling the voter to prepare his ballot, or prior to, or on the day of election, wilfully deface or destroy any list of candidates posted in accordance with the provisions of title 34 concerning elections. No person shall, during an election, tear down or deface the cards printed for the instruction of voters. Every person wilfully violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be fined in any sum not exceeding \$100.00. [I.C., § 18-2317, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 3; reen. 1899, p. 27, § 3; reen. R.C., & C.L., § 6370; C.S., § 8111; I.C.A., § 17-416 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Elections, § 34-101.

18-2318. Electioneering at polls. — (1) On the day of any primary, general or special election, no person may, within a polling place, or any building in which an election is being held, or on private property within one hundred (100) feet thereof, or on public property within three hundred (300) feet thereof:

- (a) Do any electioneering;
- (b) Circulate cards or handbills of any kind;
- (c) Solicit signatures to any kind of petition; or
- (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.

(2) No person may obstruct the doors or entries to a building in which a polling place is located or prevent free access to and from any polling place.

(3) Any election officer, sheriff, constable or other peace officer is hereby authorized, and it is hereby made the duty of such officer, to arrest any person violating the provisions of subsections (1) and (2) of this section, and such offender shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor exceeding one hundred dollars (\$100). [I.C., § 18-2318, as added by 1986, ch. 97, § 2, p. 275; am. 1997, ch. 360, § 1, p. 1061.]

Compiler's notes. Former § 18-2318, which comprised I.C., § 18-2318, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1986, ch. 97, § 1, effective March 22, 1986.

Another former § 18-2318, which comprised 1890-1891, p. 50, § 4; reen. 1899, p. 27, § 4; reen. R.C. C.L., § 6371; C.S., § 8112;

I.C.A., § 17-417, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Section 3 of S.L. 1986, ch. 97 is compiled as § 34-2309.

Section 4 of S.L. 1986, ch. 97 declared an emergency. Approved March 22, 1986.

Sec. to sec. ref. This section is referred to in § 34-1006.

18-2319. Attempt to influence votes. — No person shall attempt to influence the vote of any elector by means of a promise or a favor, or by means of violence or threats of violence, or threats of withdrawing custom or dealing in business or trade, or enforcing the payment of a debt, or discharging from employment, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him, or by any other means. [I.C., § 18-2319, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 5; reen. 1899, p. 27, § 5; reen. R.C., & C.L., § 6372; C.S., § 8113; I.C.A., § 17-418 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2320. Bribery of electors. — No person shall in any way offer a bribe to an elector to influence his vote. [I.C., § 18-2320, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 6; reen. 1899, p. 27, § 6; reen. R.C., & C.L., § 6373; C.S., § 8114; I.C.A., § 17-419 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2321. Fraudulent permission of registration. — Any registry agent, or other person, who in any manner shall wilfully or corruptly permit any person not entitled to registration or to a certificate of registration, to be registered or have a certificate of registration, or who delays or fails to deliver the certified copies of the official register and the check list to the judges of election as required by law, or who permits any person to register after the date on which the registration books close, or who shall otherwise wilfully or corruptly violate any of the provisions of the law governing elections, the penalty for which is not herein specially prescribed, shall be punished for each and every offense by imprisonment in the penitentiary for a term of not less than one (1) year nor more than five (5) years, or by a fine of not less than \$100 nor more than \$2,000, or by both such fine and imprisonment in the discretion of the court. [I.C., § 18-2321, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 7; reen. 1899, p. 27, § 7; reen. R.C., & C.L., § 6347; C.S., § 8115; I.C.A., § 17-420 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2322. Illegal registration by voter. — Any person who shall wilfully cause, or endeavor to cause, his name to be registered in any other election district than that in which he resides, or will reside prior to the day of the next ensuing election, except as herein otherwise provided, and any person who shall cause, or endeavor to cause, his name to be registered, knowing that he is not a qualified elector, and will not be a qualified elector on or before the day of the next ensuing election, in the election district in which he causes or endeavors to cause such registry to be made, and any person who shall induce, aid or abet any one in the commission of either of

the acts in this section enumerated and described, shall be fined not less than fifty dollars (\$50.00) nor more than \$500.00, or be confined in the county jail for not less than one (1) month nor more than six (6) months, or both. [I.C., § 18-2322, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 8; reen. 1899, p. 27, § 8; reen. R.C., & C.L., § 6375; C.S., § 8116; I.C.A., § 17-421 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2323. Placing placards in booths. — Any person or officer of election who shall put, or permit to be put, into a voting booth, any placard, notice or device, except the sample ballots and cards of instruction as by law provided, intended or likely to call the attention of the voter to any candidate, or to urge the voter to vote for any particular candidate, or shall put, or allow anything to be put, into such booths for the use or comfort of the voter whereby the claims of any candidate are urged upon the voter, either directly or indirectly, shall be imprisoned in the county jail not to exceed three (3) months, or fined not to exceed \$500.00, or both. [I.C., § 18-2323, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1890-1891, p. 50, § 9; reen. 1899, p. 27, § 9; reen. R.C., & C.L., § 6376; C.S., § 8117; I.C.A., § 17-422 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

CHAPTER 24

THEFT

SECTION.

- 18-2401. Consolidation of theft offenses.
- 18-2402. Definitions.
- 18-2403. Theft.
- 18-2403A. [Repealed.]
- 18-2404. Prima facie evidence — Theft by lessee.
- 18-2405. Proof of fraudulent intent in procuring food, lodging or other accommodations.
- 18-2406. Defenses.
- 18-2407. Grading of theft.
- 18-2408. Punishment for theft.
- 18-2409. Pleading and proof.
- 18-2410. Prohibiting defacing, altering or

SECTION.

- obliterating numbers — Sales prohibited — Penalty.
- 18-2411. Unlawful use of theft detection shielding devices.
- 18-2412, 18-2413. [Repealed.]
- 18-2415. Scanning — Reencoding.
- 18-2416. Short title.
- 18-2417. Definitions.
- 18-2418. Prohibited sales — Certain merchandise.
- 18-2419. Recordkeeping requirements — Violations.
- 18-2420. Exemptions.
- 18-2421. Penalties.

18-2401. Consolidation of theft offenses. — (1) Conduct denominated theft in this chapter constitutes a single offense superceding the separate offenses previously known as embezzlement, extortion, false pretenses, cheats, misrepresentations, larceny and receiving stolen goods.

(2) An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment, information or complaint, subject only to the power of the court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of

the defense would be prejudiced by lack of fair notice or by surprise. [I.C., § 18-2401, as added by 1981, ch. 183, § 2, p. 319.]

Compiler's notes. Former §§ 18-2401 — 18-2403, 18-2404 — 18-2410 (I.C., §§ 18-2401 — 18-2403, 18-2404 — 18-2410 as added by 1972, ch. 336, § 1, p. 844), were repealed by S.L. 1981, ch. 183, § 1.

Other former §§ 18-2401 — 18-2403 and 18-2404 — 18-2410 which comprised Cr. & P., 1864, §§ 69, 74-76; R.S., R.C., & C.L., §§ 7065-7066; C.S., §§ 8450, 8451 and 8451A, as added by 1927, ch. 45, § 1, p. 60, 8452, 8454-8458; I.C.A., §§ 17-3601 — 17-3610, were repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Cross ref. Drawing check without funds or with insufficient funds, §§ 1-2301A, 18-3106.

Misuse of financial transaction card, §§ 18-3122 — 18-3127.

See subdivision "embezzlement" in table of cross references to penal provisions in other volumes at end of this volume.

Sec. to sec. ref. This chapter is referred to in §§ 19-5506 and 33-2620.

This section is referred to in §§ 18-7803, 19-5506 and 19-2520C.

ANALYSIS

Evidence.

Grand larceny.

Indictment and information.

Evidence.

Possession of recently stolen property is evidence from which a larceny may be permis-

sively inferred by the triers of fact. *State v. Hoffman*, 109 Idaho 127, 705 P.2d 1082 (Ct. App. 1985).

Grand Larceny.

In deciding the propriety of aggregating several small larcenous acts into one charge of grand larceny, the test is whether the items were possessed as a part of a single incident or pursuant to a common scheme or plan reflecting a single, continuing criminal impulse or intent. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

Indictment and Information.

Where the property was stolen at the same time from one individual, and, on the same day, the defendant and her associates transported all of the stolen property to the city outside of the Indian reservation, pawned one item there, and proceeded to the reservation where they were arrested, the defendant committed but one offense of possession of stolen property; accordingly, she was properly charged in the information with but one offense, and the amendment to the information adding the property recovered from the pawn shop under the same offense was permissible. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Evidence proving corpus delicti.

Instructions.

Lack of specific intent.

Evidence Proving Corpus Delicti.

Where there was evidence that a cow's owners had put it out to summer on their land, that they were unable to find the cow when they removed their animals from the pasture and that they reported the cow as lost shortly thereafter, where a youth who occasionally worked for defendant testified that defendant told him that she had found a cow alongside the road and had loaded it into her pickup and another witness testified he had received the cow from defendant in exchange for some work he had done for her and the bill of sale that she gave him was admitted in evidence, and where investigation revealed that the cow the witness received bore a lightly applied brand registered to the owners and the owners identified pictures of the animal that defendant gave to the witness as being the animal they reported missing, such evidence was sufficient to prove the corpus delicti. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

imal that defendant gave to the witness as being the animal they reported missing, such evidence was sufficient to prove the corpus delicti. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Instructions.

In action for theft of cow, once evidence was submitted that would support a finding that the cow was stolen it was not error for the trial court to give an instruction that defendant's unexplained possession of recently stolen property may raise an inference that the defendant committed the larceny. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Lack of Specific Intent.

Where evidence showed that a rancher purchased a mare and released it into his pasture and that another mare which was similar in

size and appearance to his own apparently strayed into the pasture, and where the rancher sold the second mare when it became barren, he could not be convicted for grand larceny in the sale of such mare since the circumstantial evidence adduced was consistent with the rancher's assertion that sale was a mistake, thus, there was necessarily reasonable doubt as to the element of felonious intent. *State v. Anderson*, 102 Idaho 464, 631 P.2d 1223 (1981).

Collateral References. 26 Am. Jur. 2d, Embezzlement, § 1 et seq.

31A Am. Jur. 2d, Extortion and Blackmail, § 1 et seq.

32 Am. Jur. 2d False Pretenses, § 1 et seq.

50 Am. Jur. 2d, Larceny, § 1 et seq.

66 Am. Jur. 2d, Receiving and Transporting Stolen Goods, § 1 et seq.

29A C.J.S., Embezzlement, § 1 et seq.

35 C.J.S., Extortion, § 1 et seq.

35 C.J.S., False Pretenses, § 1 et seq.

52B C.J.S., Larceny, § 1 et seq.

76 C.J.S., Receiving Stolen Goods, § 1 et seq.

Should ownership of property be laid in the husband or wife in an indictment for larceny. 2 A.L.R. 352.

Wife's criminal responsibility for receiving stolen goods from husband. 4 A.L.R. 281; 71 A.L.R. 1116.

Criminal responsibility of one cooperating in offense of embezzlement which he is incapable of committing personally. 5 A.L.R. 784; 74 A.L.R. 1110; 131 A.L.R. 1322.

Incapacity of one cooperating in offense of larceny to commit the crime personally as affecting his criminal responsibility. 5 A.L.R. 785; 74 A.L.R. 1110; 131 A.L.R. 1322.

Experimental evidence in prosecution for larceny. 8 A.L.R. 40; 85 A.L.R. 479.

Telephone conversation as false pretense. 8 A.L.R. 656.

Business transaction, false representations in, as within statute as to "confidence game." 9 A.L.R. 1527; 56 A.L.R. 727.

Variance between allegation and proof as to the capacity in which one charged with embezzlement received the property. 12 A.L.R. 603.

Intent to convert property to one's own use or to the use of third person as element of larceny. 12 A.L.R. 804.

Larceny as affected by purpose to take or retain property in payment of, or as security for, a claim. 13 A.L.R. 142; 19 A.L.R. 303; 116 A.L.R. 997.

Purpose to take or return property in payment of, or as security for, a debt or claim as affecting embezzlement. 13 A.L.R. 142; 19 A.L.R. 303; 116 A.L.R. 997.

Distinction between larceny and embezzlement. 13 A.L.R. 319; 146 A.L.R. 532.

Embezzlement by appropriating money or

proceeds of paper mistakenly delivered in excess of the amount due or intended. 14 A.L.R. 894.

Recital of, or reference to, the offense in pronouncing sentence or judgment. 14 A.L.R. 1001.

Effect of participation by spouse of owner in or consent to, taking of property. 14 A.L.R. 1271.

Operating confidence game as vagrancy. 14 A.L.R. 1501.

Vagrancy, thieving as. 14 A.L.R. 1505.

Obtaining money for goods not intended to be delivered as false pretenses. 17 A.L.R. 199.

Directing acquittal for insufficiency of the evidence, duty of trial court as to. 17 A.L.R. 923.

Entrapment to commit crime with view to prosecution therefor. 18 A.L.R. 146; 66 A.L.R. 478; 86 A.L.R. 263.

Pendency of charge of larceny as bar to charge in another county of offense involving both felonious breaking and felonious taking of same property. 19 A.L.R. 636.

"Asportation" which will support charge of larceny. 19 A.L.R. 724; 144 A.L.R. 1383.

Governmental agency, presentation of and attempt to establish fraudulent claim against. 21 A.L.R. 180.

Loans and renewals thereof, false pretenses. 24 A.L.R. 397; 52 A.L.R. 1167.

Supernatural powers, obtaining loan by claim of. 24 A.L.R. 401; 52 A.L.R. 1167.

"Infamous offense," embezzlement as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1009.

Appropriation of property after obtaining possession by fraud as larceny. 26 A.L.R. 381.

Gaming, larceny by appropriation of property obtained by fraudulent gaming. 26 A.L.R. 386.

Reduction by appellate court of punishment imposed by trial court. 29 A.L.R. 313; 89 A.L.R. 295.

Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny. 29 A.L.R. 1031.

Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person. 33 A.L.R. 787.

Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record. 33 A.L.R. 853; 56 A.L.R. 1217.

False pretense or confidence game through means of worthless check or draft. 35 A.L.R. 344; 174 A.L.R. 173.

Purchase of property on credit without intending to pay for it as larceny. 35 A.L.R. 1336.

Retaking of money lost at gambling as

robbery or larceny. 35 A.L.R. 1458; 116 A.L.R. 997.

Finder of property, larceny by. 36 A.L.R. 372.

Lost property as subject of larceny. 36 A.L.R. 373.

Bees, larceny of. 39 A.L.R. 358.

Trustee of person acting in fiduciary capacity, partner as within statute relating to embezzlement by. 41 A.L.R. 474.

Independence of contract considered with relation to embezzlement acts. 43 A.L.R. 356.

Misappropriation by officer or employee of depository or bailee as sustaining a criminal charge against him of embezzlement of property of depositor or bailor. 45 A.L.R. 933.

Threats as criminal offense. 48 A.L.R. 90.

Criterion of value for purpose of fixing degree of larceny of automobile license plates. 48 A.L.R. 1167.

Larceny or embezzlement by one spouse of other's property. 55 A.L.R. 558.

War risk insurance, embezzlement of proceeds of. 55 A.L.R. 614; 73 A.L.R. 319; 81 A.L.R. 933.

"Embezzlement" within fidelity bond. 56 A.L.R. 967.

"Larceny" within fidelity bond. 56 A.L.R. 967.

Record, false statement as to matter of, as false pretense within criminal statute. 56 A.L.R. 1217.

General owner, larceny by, of property in which another has a special interest or right in possession of bailee or pledgee. 58 A.L.R. 330.

Animals kept as pasture, larceny by general owner. 58 A.L.R. 338.

Unauthorized use of another's property by one lawfully in possession thereof as larceny. 62 A.L.R. 354.

Possession of recently stolen goods by one charged with receiving them as evidence on question of guilty knowledge. 68 A.L.R. 187.

Acceptance of defendant's note or other contractual obligation as affecting charge of embezzlement. 70 A.L.R. 208.

Acceptance of defendant's note or other contractual obligation as affecting charge of larceny. 70 A.L.R. 208.

Married woman's criminal responsibility for stealing from husband. 71 A.L.R. 1126.

Misappropriation of executor, administrator, guardian, or trustee as embezzlement. 75 A.L.R. 299.

Outlawed liquor as subject of embezzlement. 75 A.L.R. 1479.

Outlawed liquors as subject of larceny or kindred offenses. 75 A.L.R. 1479.

Verdict on conviction of larceny, which fails to state value of property, sufficiency of. 79 A.L.R. 1180.

Cash payment appropriation or removal without payment of property delivered in expectation of. 83 A.L.R. 441.

Dog as subject of larceny. 92 A.L.R. 212.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense. 95 A.L.R. 1249; 128 A.L.R. 1520.

Gas as subject of larceny. 113 A.L.R. 1282.

Electrical energy as subject of larceny. 113 A.L.R. 1283.

Water as subject of larceny. 113 A.L.R. 1284.

Oil as subject of larceny. 113 A.L.R. 1285.

Power as subject of larceny. 113 A.L.R. 1285.

Successive takings of electrical energy, gas, water, heat and power as a single offense. 113 A.L.R. 1286.

Conditional sale, offense of obtaining property by false pretenses predicated upon transaction involving. 134 A.L.R. 874.

Extortion predicated upon statements or intimations regarding criminal liability in connection with attempt to collect or settle a claim which defendant believed to be valid. 135 A.L.R. 728.

Threats of criminal prosecution to collect just debt. 135 A.L.R. 729.

False pretenses, attempt to obtain money under, predicated upon receipt or claim of benefits under insurance policy. 135 A.L.R. 1157.

Pension money, wrongful withholding of by agent. 136 A.L.R. 809.

May participant in larceny or theft be convicted of offenses of receiving or concealing the stolen property. 136 A.L.R. 1087.

Criminal charge predicated upon fraudulently obtaining a check, note, etc., or signature thereon, from the person executing the same. 141 A.L.R. 210.

False pretenses, variance between allegation that defendant obtained "money" by, and proof that he obtained and cashed a check, note, etc. 141 A.L.R. 220.

Employee or subordinate, statutes relating to embezzlement of public money by officer in charge thereof as applicable to. 144 A.L.R. 590.

Criminal offense of obtaining property by false pretenses predicated upon transactions incident to raising of funds for benevolent or charitable purpose. 145 A.L.R. 302.

Benevolent or charitable purpose, criminal offense of obtaining property by false pretenses predicated upon promissory representations incident to raising of funds for. 145 A.L.R. 307.

Fixed or controlled price as affecting value of goods for purpose of determining degree of larceny. 157 A.L.R. 1303.

Commencement of running of limitations against prosecution for embezzlement. 158 A.L.R. 1158.

Right to bill of particulars. 5 A.L.R.2d 528.

Obtaining payment by debtor on valid in-

debtedness by false representation as criminal false pretenses. 20 A.L.R.2d 1266.

Gift or other voluntary transfer by husband as fraud on wife. 49 A.L.R.2d 521; 64 A.L.R.3d 187.

Gambling or lottery paraphernalia as subject of larceny. 51 A.L.R.2d 1396.

False pretense, false statement as to existing encumbrance on chattel in obtaining loan or credit as. 53 A.L.R.2d 1215.

Embezzlement by independent collector or collection agency working on commission or percentage. 56 A.L.R.2d 1156.

Receiving property stolen in another state or country as receiving stolen property. 67 A.L.R.2d 752.

Corporate name, criminal liability of corporate officer who issues worthless checks in. 68 A.L.R.2d 1269.

Cats, larceny of. 73 A.L.R.2d 1032.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions. 78 A.L.R.2d 1359.

Taking, and pledging or pawning, another's property as larceny. 82 A.L.R.2d 863.

Attempts to receive stolen property. 85 A.L.R.2d 259.

Drawing of check on bank account of principal or employer payable to accused's creditor as constituting embezzlement. 88 A.L.R.2d 688.

Stolen money or property as subject of larceny. 89 A.L.R.2d 1435.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations. 94 A.L.R.2d 570.

Sufficiency of description of stolen property in indictment or information for receiving it. 99 A.L.R.2d 813.

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations. 99 A.L.R.2d 925.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like. 6 A.L.R.3d 241.

Reasonable expectation of payment as affecting offense under "worthless check" statutes. 9 A.L.R.3d 719.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim. 10 A.L.R.3d 572.

Entrapment or consent. 10 A.L.R.3d 1121.

Cotenant taking cotenancy property. 17 A.L.R.3d 1394.

Single or separate larceny predicated upon stealing property from different owners at the same time. 37 A.L.R.3d 1407.

Criminal liability in connection with rental of motor vehicles. 38 A.L.R.3d 949.

Imposition of constructive trust in property

bought with stolen or embezzled funds. 38 A.L.R.3d 1354.

Purse snatching as robbery or theft. 42 A.L.R.3d 1381.

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin operated machine. 45 A.L.R.3d 1286.

Criminal liability of corporation for extortion, false pretenses or similar offenses. 49 A.L.R.3d 820.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 A.L.R.3d 727.

Separate takings over a period of time, aggregation of rendering the taking a grand larceny. 53 A.L.R.3d 398.

Validity in construction of statutes or rules setting up clients security fund. 53 A.L.R.3d 1298.

Receipt of public documents taken by another without authorization as receipt of stolen property. 57 A.L.R.3d 1211.

Changing of price tags by patron in self-service store as criminal offense. 60 A.L.R.3d 1293.

What constitutes "property" obtained within extortion statute. 67 A.L.R.3d 1021.

Asportation of motor vehicle as necessary element to support charge of larceny. 70 A.L.R.3d 1202.

Cashing check at bank at which account is maintained as violation of bad check statutes. 75 A.L.R.3d 1080.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 A.L.R.3d 842.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes. 77 A.L.R.3d 689.

Gaming, retaking of money lost at, as larceny. 77 A.L.R.3d 1363.

Where embezzlement is committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

Criminal liability for wrongfully obtaining unemployment benefits. 80 A.L.R.3d 1280.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner. 82 A.L.R.3d 822.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Measure, elements and amount of damages for killing or injuring cat. 8 A.L.R.4th 1287.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act. 19 A.L.R.4th 959.

Criminal liability under state laws in connection with application for or receipt of public welfare payments. 22 A.L.R.4th 534.

Criminal liability for theft of, interface

with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

Cat as subject of larceny. 55 A.L.R.4th 1080.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense. 64 A.L.R.4th 1088.

Liability for injuries caused by cat. 68 A.L.R.4th 823.

18-2402. Definitions. — The following definitions are applicable to this chapter:

(1) “Appropriate.” To “appropriate” property of another to oneself or a third person means:

- (a) To exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit; or
- (b) To dispose of the property for the benefit of oneself or a third person.

(2) “Deception” means knowingly to:

- (a) Create or confirm another’s impression which is false and which the offender does not believe to be true; or
- (b) Fail to correct a false impression which the offender previously has created or confirmed; or
- (c) Prevent another from acquiring information pertinent to the disposition of the property involved; or
- (d) Sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property whether such impediment is or is not valid, or is or is not a matter of official record; or
- (e) Promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform, standing alone, is not evidence that the offender did not intend to perform.

(3) “Deprive.” To “deprive” another of property means:

- (a) To withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him; or
- (b) To dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

(4) “Obtain” means:

- (a) In relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and
- (b) In relation to labor or services, to secure the performance thereof.

(5) “Obtains or exerts control” over property, includes, but is not limited to, the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property.

(6) “Owner.” When property is taken, obtained or withheld by one (1) person from another person, an owner thereof means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.

(7) “Person” means an individual, corporation, association, public or private corporation, city or other municipality, county, state agency or the state of Idaho.

(8) "Property" means anything of value. Property includes real estate, money, commercial instruments, admission or transportation tickets, written instruments representing or embodying rights concerning anything of value, labor or services, or otherwise of value to the owner; things growing on, affixed to, or found on land, or part of or affixed to any building; electricity, gas, steam, and water; birds, animals and fish, which ordinarily are kept in a state of confinement; food and drink; samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes or models thereof, or any other articles, materials, devices, substances and whole or partial copies, descriptions, photographs, prototypes or models thereof which constitute, represent, evidence, reflect or record a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention, or improvement.

(9) "Service" includes, but is not limited to, labor, professional service, transportation service, the supplying of hotel accommodations, restaurant services, entertainment, (a communication system) the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water. A ticket or equivalent instrument which evidences a right to receive a service is not in itself service but constitutes property within the meaning of subsection (8) of this section.

(10) "Stolen property" means property over which control has been obtained by theft.

(11) "Value." The value of property shall be ascertained as follows:

(a) Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.

(b) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:

1. The value of an instrument constituting an evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

2. The value of a ticket or equivalent instrument which evidences a right to receive a transportation, entertainment or other service shall be deemed the price stated thereon, if any; and if no price is stated thereon the value shall be deemed the price of such ticket or equivalent instrument which the issuer charges the general public.

3. The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(c) When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in paragraphs (a) and (b) of this subsection, its value shall be deemed to be one thousand dollars (\$1,000) or less.

(d) For the purpose of establishing value of any written instrument, the interest of any owner or owners entitled to part or all of the property represented by such instrument, by reason of such instrument, may be shown, even if another owner may be named in the complaint, information or indictment. [I.C., § 18-2402, as added by 1981, ch. 183, § 2, p. 319; am. 1994, ch. 132, § 1, p. 301; am. 1999, ch. 147, § 1, p. 417.]

Compiler's notes. Former § 18-2402 was repealed. See compiler's notes, § 18-2401.

The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1994, ch. 132 is compiled as § 18-2407.

Sec. to sec. ref. This section is referred to in §§ 6-210, 18-7803 and 19-5304.

ANALYSIS

"Carrying away" not required.

Evidence.

"Value" for restitution.

"Carrying Away" Not Required.

Nothing in § 18-2403 or in the definition of "obtain," as used in that section and defined in subsection (4)(a) of this section, required that the property be carried away from the owner's premises in order for the crime to be complete and a transfer of possession with the intent to deprive the owner of the property was sufficient, and that asportation was not a required element of theft under § 18-2403(3). State v.

Gums, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995).

Evidence.

Evidence was sufficient to support the charge that defendant attempted to take property of another by deception and evidence that the company was the owner of the property was properly admitted and supported the charge; the jury could determine that the value of the property defendant attempted to obtain exceeded \$300 and the license to bargain and puff did not encompass the license to falsify documents and make claims for injuries and damages arising from another accident. State v. Summer, — Idaho —, 76 P.3d 963 (2003).

"Value" for Restitution.

Under I.C. § 19-5304(1)(a), restitution is for economic loss which includes, but is not limited to, the market value of the stolen property at the time and place of the crime. State v. Bybee, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

18-2403. Theft. — (1) A person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

(2) Theft includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subsection (1) of this section, committed in any of the following ways:

(a) By deception obtains or exerts control over property of the owner;

(b) By conduct heretofore defined or known as larceny; common law larceny by trick; embezzlement; extortion; obtaining property, money or labor under false pretenses; or receiving stolen goods;

(c) By acquiring lost property. A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner; or a person commits theft of lost or mislaid property when he:

1. Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and
2. Fails to take reasonable measures to restore the property to the owner; and
3. Intends to deprive the owner permanently of the use or benefit of the property.

(d) By false promise:

1. A person obtains property by false promise when pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.
2. In any prosecution for theft based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are consistent with guilty intent or belief and inconsistent with innocent intent or belief, and excluding to a moral certainty every reasonable hypothesis except that of the defendant's intention or belief that the promise would not be performed;

(e) By extortion. A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

1. Cause physical injury to some person in the future; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him; or
5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

(3) A person commits theft when he knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in,

the property of another person, with the intent of depriving the owner thereof.

(4) A person commits theft when he knowingly receives, retains, conceals, obtains control over, possesses, or disposes of stolen property, knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen, and

(a) Intends to deprive the owner permanently of the use or benefit of the property; or

(b) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(c) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

(5) Theft of labor or services or use of property.

(a) A person commits theft when he obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor or services.

(b) A person commits theft when after renting or leasing a motor vehicle under an agreement in writing which provides for the return of the vehicle to a particular place at a particular time, he willfully or intentionally fails to return the vehicle to that place within forty-eight (48) hours after the time specified.

(c) A person commits theft if, having control over the disposition of services of others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

[I.C., § 18-2403, as added by 1981, ch. 183, § 2, p. 319; am. 1985, ch. 216, § 1, p. 525; am. 2001, ch. 112, § 1, p. 401.]

Compiler's notes. Former § 18-2403 was repealed. See Compiler's notes, § 18-2401.

Section 2 of S.L. 2001, ch. 112 is compiled as § 18-2408.

Section 3 of S.L. 2001, ch. 112 declared an emergency. Approved March 22, 2001.

Sec. to sec. ref. This section is referred to in §§ 18-2409, 18-7803 and 72-1011.

Cited in: State v. Hellberg, 105 Idaho 261, 668 P.2d 137 (Ct. App. 1983); State v. Mason, 107 Idaho 706, 692 P.2d 350 (1984); Brown v. State, 108 Idaho 655, 701 P.2d 275 (Ct. App. 1985); Stone v. State, 108 Idaho 822, 702 P.2d 860 (Ct. App. 1985); State v. Griffith, 110 Idaho 613, 716 P.2d 1385 (Ct. App. 1986); State v. Bias, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986); State v. James, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986); State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987); State v. Chapman, 112 Idaho 1011, 739 P.2d 310 (1987); State v. Clayton, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987); Matthews v. State, 113 Idaho 83, 741 P.2d 370 (Ct. App. 1987); State v. Chacon, 114 Idaho 789, 760 P.2d 1205 (Ct. App. 1988); State v. Cirelli, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989); State v.

Hoffman, 116 Idaho 480, 776 P.2d 1199 (Ct. App. 1989); State v. Marek, 116 Idaho 580, 777 P.2d 1253 (Ct. App. 1989); State v. Woodman, 116 Idaho 716, 779 P.2d 30 (Ct. App. 1989); State v. Tomes, 118 Idaho 952, 801 P.2d 1303 (Ct. App. 1990); State v. Aubert, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991); State v. Weinmann, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992); State v. Johnston, 123 Idaho 222, 846 P.2d 224 (Ct. App. 1993); State v. Upton, 127 Idaho 274, 899 P.2d 984 (Ct. App. 1995); State v. Weaver, 127 Idaho 288, 900 P.2d 196 (1995); State v. Thomas, 133 Idaho 682, 991 P.2d 870 (Ct. App. 1999).

ANALYSIS

"Carrying away" not required.

Constitutionality.

Construction.

Evidence.

Guilty plea.

— Probation violation.

Indictment and information.

Instructions.

Intent.

Jurisdiction of Indian tribe.
 Legislative intent.
 Possession of stolen property.
 Sentence.

"Carrying Away" Not Required.

Nothing in this section or in the definition of "obtain," as used in this section and defined in § 18-2402(4)(a), required that the property be carried away from the owner's premises in order for the crime to be complete and a transfer of possession with the intent to deprive the owner of the property was sufficient, and that asportation was not a required element of theft under subsection (3) of this section. *State v. Gums*, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995).

Constitutionality.

Since the elements of theft by deception and theft by false promise as defined in subsections (2)(a) and (d) of this section include a component of dishonesty or falsehood, for the former requires that the perpetrator engaged in some deception in order to acquire property and the latter requires a scheme to defraud or an express or implied misrepresentation, these subsections advance the state's interest in preserving good morals and honest dealing and are permissible criminal provisions that do not run afoul of Const., Art. 1, § 15. *State v. Owen*, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997).

Construction.

The crime of grand theft by possession of stolen property found in subsection (4) of this section is not a mere recodification of former § 18-4612 (now repealed). *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

The statute does not define the possession of property stolen from multiple victims as multiple offenses where it is not shown that the defendant acquired the property by separate acts of possession or knew that it came from more than one victim or more than one act of stealing. *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002).

Evidence.

On appeal from a conviction of grand theft, where the state's evidence showed that the defendant wanted to purchase a motor home from the victim, but credit problems arose which could not be resolved until the next day, and the victim loaned the defendant a pickup truck to be used overnight, and the defendant did not return the truck but instead drove it to Colorado, the jury could reasonably infer that the defendant intended to deprive the victim of the truck. *State v. Decker*, 108 Idaho 683, 701 P.2d 303 (Ct. App. 1985).

Appellate review of the sufficiency of the evidence is limited in scope; a judgment of conviction, entered upon a jury verdict, will

not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Decker*, 108 Idaho 683, 701 P.2d 303 (Ct. App. 1985).

The act of stealing the property from its owner is not an element of theft by possession of stolen property under subsection (4) of this section. Therefore, it was not necessary that the employees observe the removal of items from their employer's loading dock in order to make a citizen's arrest. Under the circumstances, where the employees saw defendant in possession of items that looked identical to those stored on employer's loading dock and when confronted defendant said he thought the items had been discarded which was an admission that the items had come from the loading dock, the offense of theft by possession of stolen property was committed "in the presence" of the employees, and the court properly held that the employees had effectuated a valid citizen's arrest in compliance with this section. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

Since defendant offered to admit he took stereo from trailer, any error in court allowing the introduction of evidence regarding results of deputy's fingerprint search was harmless since there were no fingerprints found. *State v. Vandenaere*, 131 Idaho 507, 960 P.2d 190 (Ct. App. 1998).

Although defendant testified that the money shortages on the dates the grand thefts were alleged to have occurred were due to him holding money from the deposit so he could add it in to the proceeds of other days in order to boost sales performance and meet his cost budget on a daily basis in order to earn bonuses, from the evidence presented, the jury could properly infer that defendant appropriated the funds for his own use rather than to boost his sales on other dates. *State v. Stricklin*, 136 Idaho 264, 32 P.3d 158 (Ct. App. 2001).

Indictment charging defendant with theft was not defective where it indicated that defendant attempted to take money by making false statements to the claims adjuster through the demand for settlement and it was specific; indictment set forth sufficient facts to make it clear that defendant was charged with attempting to take property from the owner of the property and there were sufficient facts alleged to allow defendant to mount a defense and to preclude further prosecution arising out of the deception to the claims adjuster. *State v. Summer*, — Idaho —, 76 P.3d 963 (2003).

Guilty Plea.

Where, when the guilty plea was entered, the defendant had not been told that if the

case went to trial the state would have to prove the specific intent and knowledge required for a conviction under this section, and no prejudice to the state was shown, the defendant was permitted to withdraw his guilty plea. *State v. Henderson*, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

Where defendant made a plea agreement and agreed to plead guilty to petit theft under subsection (3) of this section and § 18-2407(2) and as part of his plea agreement the prosecutor agreed not to recommend incarceration, State did not breach plea agreement when it filed brief with appellate court urging affirmation of the sentence and of the magistrate's denial of Rule 35 relief as at the appeal stage the sentence was already pronounced and the State's role was no longer that of making a recommendation as to what would be an appropriate sentence. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

—Probation Violation.

Once defendant violated the terms of his probation, the district court was not bound by the plea agreement that stated defendant's disposition was to be a withheld judgment with five years on probation, and the court was free to sentence defendant to a period of incarceration within the statutory maximum for grand theft. *Short v. State*, 135 Idaho 40, 13 P.3d 1253 (Ct. App. 2000).

Indictment and Information.

Where the property was stolen at the same time from one individual, and, on the same day, the defendant and her associates transported all of the stolen property to the city outside of the Indian reservation, pawned one item there, and proceeded to the reservation where they were arrested, the defendant committed but one offense of possession of stolen property; accordingly, she was properly charged in the information with but one offense, and the amendment to the information adding the property recovered from the pawn shop under the same offense was permissible. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

The trial court did not err in permitting prosecutor to amend an information against defendant to include the charge of grand theft by obtaining control of stolen property where he was originally charged with grand theft. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

Instructions.

In prosecution for embezzlement and forgery, jury instructions which stated that to find defendant guilty of charge of theft by embezzlement each of the elements in the charge must be proven beyond a reasonable doubt that defendant with fraudulent intent appropriated funds belonging to her employer and

applied these funds toward the purchase of lots 3 and/or 4 of a certain subdivision, were proper, even though defendant contended that the instructions failed to address the requirement that the jury unanimously find, beyond a reasonable doubt, that defendant applied the moneys either to purchase of lot 3, lot four, or both, and since the court gave a separate instruction defining "fraudulent intent" as well as instructions as to how a defense to embezzlement is shown and that its verdict must be unanimous and the elements of the crime embezzlement as given in the instructions were drawn from this section and § 18-2407, the trial court fully instructed the jury on the elements which the state had to prove in order for the jury to reach a unanimous finding of guilt. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

Intent.

The element of intent to deprive another of property need not be shown by direct evidence but may be inferred from circumstantial evidence. *State v. Krommenhoek*, 107 Idaho 188, 687 P.2d 578 (Ct. App. 1984).

Where the defendants each received stolen property from a recent acquaintance and claimed that the stolen goods were left with the defendants by the acquaintance in payment of a debt, the disparities in value between the stolen goods and the debt were sufficient for the jury to reasonably find that each knew or should have known that the property was stolen. *State v. Ralls*, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986).

There was substantial evidence on the issue of fraudulent intent to support the jury's guilty verdict where the defendant was told to use the money in any way his mother would use it, was told not to deplete the assets of his mother's estate, and the jury could infer from the enormity and nature of the defendant's expenditures that he intended to appropriate to himself the items purchased. *State v. Boag*, 118 Idaho 944, 801 P.2d 1295 (Ct. App. 1990).

Jurisdiction of Indian Tribe.

The state failed its burden to show that the tribe's consent to jurisdiction over an Indian who violated § 18-4612 (now repealed) in 1965 constituted contemporary consent to jurisdiction over an Indian who violated subsection (4) of this section. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

The tribal resolution which granted the state concurrent jurisdiction over the offenses, embezzlement, disturbing the peace, simple assault, kidnapping, vagrancy and receiving stolen property did not grant consent over a class of offenses which included grand theft by possession of stolen property. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

Legislative Intent.

The legislature did not intend the retention of collateral after default on a secured obligation to constitute theft by unauthorized control based solely upon breach of a contractual promise. Therefore, evidence was insufficient to convict defendant, who neither paid the promissory note he had signed as down payment or returned the vehicle, of grand theft by unauthorized control. *State v. Henninger*, 130 Idaho 638, 945 P.2d 864 (Ct. App. 1997).

Possession of Stolen Property.

Subsection (4) of this section requires that the defendant knew or under the circumstances would reasonably have been induced to believe that the property was stolen. *State v. Ralls*, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986).

Possession of recently stolen property is a circumstance from which a trier of fact may infer knowledge of its stolen character. *State v. Ralls*, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986).

Where the crime occurred no later than 1987 when defendant came into possession of truck with knowledge that it was stolen and with the intent to deprive the owner thereof, the statute of limitations had run by 1991 when the information against defendant was filed. *State v. Barnes*, 124 Idaho 379, 859 P.2d 1387 (1993).

The crime of grand theft by possession of stolen property requires proof that the defendant had knowledge that the property was stolen or that he possessed the stolen items under circumstances that would have reasonably induced him to believe that the property was stolen. *State v. Ashley*, 126 Idaho 694, 889 P.2d 723 (Ct. App. 1994).

The act of stealing the property from its owner is not an element of theft by possession of stolen property under subsection (4) of this section. Therefore, it was not necessary that employees observe the removal of items from their employer's loading dock in order to make a citizen's arrest; under the circumstances where the employees saw defendant in possession of items that looked identical to those stored on employer's dock and when confronted defendant said he thought the items had been discarded which was an admission that the items had come from the loading dock, the employees witnessed the theft and could make a citizen's arrest. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

Sentence.

A previously suspended, indeterminate seven-year sentence for grand theft was not

excessive where the defendant pled guilty to another grand theft, the presentence report showed several misdemeanor violations and, with the recent grand theft charge, three felony convictions, and moreover, he poorly performed in, and violated, both of the probation opportunities granted him. *State v. Sanchez*, 114 Idaho 387, 757 P.2d 250 (Ct. App. 1988), *aff'd*, 115 Idaho 776, 769 P.2d 1148 (1989).

The court properly denied a motion for a reduction of sentence by defendant convicted of possession of controlled substance with intent to deliver and of theft by possession of stolen property where defendant was sentenced to concurrent, unified sentences of seven years with three years minimum confinement and of five years with three years minimum confinement, and where these sentences were well within the statutorily permitted maximum penalties. *State v. Garcia*, 115 Idaho 559, 768 P.2d 822 (Ct. App. 1989).

Where defendant received two concurrent unified ten-year sentences, each with a five-year minimum term of confinement for grand theft by false promise involving over 24 victims, the sentence was not an abuse of discretion. *State v. Bianchi*, 121 Idaho 766, 828 P.2d 329 (Ct. App. 1992).

Although the sentence of 1 year in jail with 180 days suspended and 2 years probation imposed by the magistrate under a plea agreement to plead guilty to petit theft under subsection (3) of this section and § 18-2407(2) was stringent for a first offense, neither the sentence as imposed nor the denial of the defendant's Rule 35 motion for reduction of sentence was an abuse of discretion where the magistrate concluded that defendant and his wife had been engaged in a carefully orchestrated scheme using their young son to assist in the theft of store merchandise. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

Where district court in its sentencing remarks considered defendant's upbringing in an emotionally and physically abusive home and concluded that she suffered from a personality disorder resembling an addiction which prevented her from acknowledging the wrong she had committed and that she had been involved in similar crimes, and after reviewing the objectives of sentencing determined that a term of incarceration was necessary to protect society and deter others, district court acted within in its discretion of imposing a sentence of ten years' incarceration, with a minimum term of 3 years, for the crimes of embezzlement and forgery. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Corporations.
 Embezzlement.
 —Act of taking.
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 —Property subject to.
 Extortion.
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 —Elements of offense.
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 —Embezzlement.
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 —Receiving stolen property.
 Intent.
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 —Elements of offense.
 Rightful claim.
 Right to fair trial.

Corporations.

An officer of a corporation may be guilty of receiving money under false pretenses, where he was an officer and stockholder and stood to benefit therefrom, though he did not receive the money personally. *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934).

Embezzlement.

Since the reference to "feloniously stealing" in the former larceny statute included both felony and misdemeanor offenses, i.e. grand and petit larceny, the same was true of that language as used in the former embezzlement statute and a defendant could properly plead guilty to misdemeanor embezzlement. *Sparrow v. State*, 102 Idaho 60, 625 P.2d 414 (1981).

—Act of Taking.

Distinct act of taking was not necessary to constitute embezzlement. *State v. Sage*, 22 Idaho 489, 126 P. 403, 1914B Ann. Cas. 251 (1912). But see *State v. Jones*, 25 Idaho 587, 138 P. 1116 (1914).

—Elements of Offense.

There can be no embezzlement unless owner is deprived of money or property involved in the transaction. *State v. Jones*, 25 Idaho 587, 138 P. 1116 (1914).

Bad loans made by state bank officers, in absence of fraudulent intent, were not deductible from gross income under internal revenue law as losses through embezzlement. *Porter v. United States*, 20 F.2d 935 (D. Idaho 1927), *aff'd*, 27 F.2d 882 (9th Cir. 1928).

Demand and nonpayment were not elements of embezzlement, but were merely ev-

idence thereof. *State v. Peters*, 43 Idaho 564, 253 P. 842 (1927); *State v. White*, 46 Idaho 124, 266 P. 415 (1928).

Crime of embezzlement involved among other things the following: 1. Existence of fiduciary relations between accused and person injured, of character mentioned in statute. 2. Receipt or acquisition by accused of property of another by reason of that fiduciary relation. *State v. White*, 46 Idaho 124, 266 P. 415 (1928).

—Property Subject to.

Credit in the nature of an overdraft might have been subject of embezzlement by officer or agent of bank or trust company. *State v. Lottridge*, 29 Idaho 53, 155 P. 487 (1916), *sub nom.*, 29 Idaho 822, 162 P. 672 (1917).

Deposit in bank might have embezzled by servant or agent of depositor. *State v. Lockie*, 43 Idaho 580, 253 P. 618 (1927).

Property within care and control of party was subject to embezzlement regardless of any secret intent he may have entertained to steal it. *State v. Lockie*, 43 Idaho 580, 253 P. 618 (1927).

Where defendant, lessor and independent operator of oil company's gasoline station, entrusted with oil company's gasoline for purpose of sale, failed to turn over to oil company its portion of proceeds for sale of gasoline, defendant was guilty of embezzlement, notwithstanding he was not required to make remittance to company from specific moneys collected from gasoline sales. *State v. Compton*, 92 Idaho 739, 450 P.2d 79 (1969).

Extortion.

Although one party had committed a crime in theft of property from another, party whose property was thus taken was not justified and could not be protected by courts in extorting money from one who committed theft under threats of arrest and imprisonment, where he used such threats as means of procuring a payment from the guilty party in excess of the reasonable value of property taken. *Wilbur v. Blanchard*, 22 Idaho 517, 126 P. 1069 (1912).

The obtaining of property of another by threats to injure him and to destroy his property is extortion. *State v. Phillips*, 62 Idaho 656, 115 P.2d 418 (1941).

—Exposure of Crime.

Extortion is the obtaining of property from another, with his consent induced by wrongful force, fear or color of official right, and such fear may be induced by a threat to accuse the party of a crime. *Wilbur v. Blanchard*, 22 Idaho 517, 126 P. 1069 (1912).

It is a criminal offense for a creditor to obtain money or property from a debtor by means of a threat to accuse the latter of a

crime, although the creditor believes that the money or property is actually due him, and although he believes the debtor guilty of the crime which he is threatening to expose; the fact that the person threatened is guilty of the crime of which he is threatened with exposure is unimportant so far as the guilt of the person making the threat is concerned. *State v. Adjustment Dep't Credit Bureau, Inc.*, 94 Idaho 156, 483 P.2d 687 (1971).

False Pretenses.

—Elements of Offense.

"False pretense" has been defined to be fraudulent representation of existing or past fact by one who knows it is not true, adapted to induce person to whom it is made to part with something of value. *State v. Whitney*, 43 Idaho 745, 254 P. 525 (1927).

Essence of crime of obtaining money under false pretenses lies in obtaining money with intent to defraud. *State v. Whitney*, 43 Idaho 745, 254 P. 525 (1927).

The payment of a fraudulent invoice by check, charged to account of complaining witness and credited to account of accused's company, was sufficient passage of title to money to sustain conviction for obtaining money under false pretenses. *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934).

Instructions.

—Embezzlement.

In an embezzlement prosecution, refusing instruction that restitution could not be considered as bearing on defendant's intent was not error. *State v. Clark*, 47 Idaho 750, 278 P. 776 (1929).

A court's instruction defining embezzlement which contained the elements of embezzlement as set out in former law regarding embezzlement by public and corporate officers together with other instructions setting out the necessity for fraudulent intent justified the court's refusal of defendant's requested instruction setting out a series of six elements of embezzlement. *State v. Carpenter*, 92 Idaho 12, 435 P.2d 789 (1967).

On retrial of a prosecution for embezzlement, involving as it did an element of specific intent, the instruction to the jury that "every person of sound mind is presumed to intend the natural and probable consequences of his acts" should not be given. *State v. McCoy*, 100 Idaho 753, 605 P.2d 517 (1980).

—False Pretenses.

Instruction that the false representation must have been an effective cause in inducing complaining witness to part with his money, but that such representation need not be sole cause, and to be effective cause it was necessary to find that but for such representation witness would not have parted with his

money was proper. *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934).

—Receiving Stolen Property.

Since scienter is necessary for conviction of receiving stolen property and since the mere possession of recently stolen property cannot give rise to a legal presumption of guilty knowledge and felonious intent, the trial court's instruction in a prosecution for receiving stolen calves that a presumption of guilt arises from the unsatisfactorily explained possession of the recently stolen property constituted reversible error as an unconstitutional infringement upon the presumption of defendant's innocence. *State v. Trowbridge*, 97 Idaho 93, 540 P.2d 278 (1975).

Intent.

To constitute crime of larceny, felonious intent must exist at time of taking property. *State v. Riggs*, 8 Idaho 630, 70 P. 947 (1902).

Where one rightfully in possession of personal property subsequently conceives the intent of appropriating it, he is not guilty of larceny. *State v. Riggs*, 8 Idaho 630, 70 P. 947 (1902).

While it is true that one is presumed to intend necessary or natural consequences of his voluntary act and that generally, if it is proved that accused knowingly committed unlawful act, it will be presumed that it was done with criminal intent, but this rule without qualifications does not apply to crimes for which specific intent is necessary. *State v. Peters*, 43 Idaho 564, 253 P. 842 (1927).

Word "intentional" as used in penal laws is held to import evil intent and unlawful purpose. *State v. Peters*, 43 Idaho 564, 253 P. 842 (1927).

To constitute crime of larceny felonious intent must exist at the time of the taking. *State v. Hopple*, 83 Idaho 55, 357 P.2d 656 (1960).

The intent required is the intent to deprive the owner of his property, which intent must exist at the time of the wrongful taking or stealing. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

Larceny is a crime of specific intent and the burden of proving the requisite mental state beyond a reasonable doubt belongs to the prosecution. *State v. Erwin*, 98 Idaho 736, 572 P.2d 170 (1977).

Lesser Included Offense.

The crime of disposing of stolen property under § 18-4612 (repealed) was not a lesser included offense of the crime of burglary. *State v. Martin*, 104 Idaho 195, 657 P.2d 492 (Ct. App. 1983).

Moral Turpitude.

Because fraud is an element of the crime, it involves moral turpitude so as to justify dis-

barment. In re Mills, 71 Idaho 128, 227 P.2d 81 (1951).

Property.

The word property signifies all valuable rights or interest which are protected by law, and a materialman's lien right as provided for by § 45-501 is a valuable property right, the waiver of which would also be "property." State v. Davis, 81 Idaho 61, 336 P.2d 692 (1959).

Receiving Stolen Property.

—Elements of Offense.

Before defendant can be convicted for receiving stolen property, four things must be established to the satisfaction of the jury beyond a reasonable doubt: (1) That property was stolen; (2) that either thief delivered it to defendant, or to someone else who delivered it to him; (3) that at time defendant received possession of property he knew it was stolen, or that it was received under such circumstances that any reasonable person of ordinary observation would have known that it was in fact stolen property; and (4) that he received it for his own gain or to prevent owner again possessing it. State v. Janks, 26 Idaho 567, 144 P. 779 (1914).

Rightful Claim.

The use of the word "wrongful" had no reference to justness of ultimate results, but related solely to the method used to obtain such results. State v. Phillips, 62 Idaho 656, 115 P.2d 418 (1941).

Right to Fair Trial.

Where, while the defendant was in jail awaiting trial on a charge of possession of stolen property, the sheriff monitored and tape-recorded all the phone calls made by the defendant, including one made to an attorney, and photocopied all the mail both received and sent by the defendant, the sheriff's practices were not to be condoned; however, since none of the information gathered by the sheriff was used as evidence in the defendant's trial and the attorney called was not the defendant's trial counsel, the sheriff's conduct did not prejudice the defendant's right to a fair trial nor deny him the effective assistance of counsel. State v. Martinez, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982).

Collateral References. Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to the person." 87 A.L.R.5th 715.

18-2403A. Prima facie intent of lessee or renter. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-2403A, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 183, § 1.

Another § 18-2403A which comprised S.L. 1963, ch. 70, § 1, p. 262, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-2404. Prima facie evidence — Theft by lessee. — It shall be prima facie evidence that a person knowingly obtains or exerts unauthorized control over property of the owner when a lessee of the personal property of another, leased or rented by written instrument:

(1) Fails or refuses to return such personal property to its owner after the lease or rental agreement has expired:

(a) Within ten (10) days; and

(b) Within forty-eight (48) hours after written demand for return thereof is personally served or given by registered mail delivered to the last known address provided in such lease or rental agreement; or

(2) When the lease or rent of such personal property is obtained by presentation of identification to the lessor or renter thereof which is false, fictitious, or knowingly not current to name, address, place of employment, or other identification. [I.C., § 18-2404, as added by 1981, ch. 183, § 2, p. 319.]

Compiler's notes. Former § 18-2404 was repealed. See compiler's notes, § 18-2401.

Cited in: State v. Boag, 118 Idaho 944, 801 P.2d 1295 (Ct. App. 1990).

DECISIONS UNDER PRIOR LAW

Elements of Larceny.

Under the former statute defining larceny, the elements in a larceny charge which had to be proven included the taking, carrying, driving or leading away, without permission, of the personal property of another, with intent to permanently deprive the owner thereof, and direct or circumstantial evidence which satisfied the factfinder beyond a reasonable

doubt that the crime charged had been committed established the corpus delicti. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Collateral References. 26 Am. Jur. 2d, Embezzlement, §§ 23, 28.

29A C.J.S., Embezzlement, §§ 20, 26.

18-2405. Proof of fraudulent intent in procuring food, lodging or other accommodations. — Proof that lodging, food or other accommodation was obtained by any deception or false pretense, or by any false or fictitious show or pretense of any baggage or other property, or that any person absconded without paying or offering to pay for such food, lodging or other accommodation, or that any such person surreptitiously removed, or attempted to remove, his or her baggage, shall be prima facie proof of the intent necessary for the theft of the same. [I.C., § 18-2405, as added by 1981, ch. 183, § 2, p. 319.]

Compiler's notes. Former § 18-2405 was repealed. See compiler's notes, § 18-2401.

Another former § 18-2405, which comprised Cr. & P. 1864, § 74; R.S., R.C., & C.L., § 7070; C.S., § 8455; I.C.A., § 17-3607 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Sec. to sec. ref. This section is referred to in § 39-1802.

Cited in: *State v. Boag*, 118 Idaho 944, 801 P.2d 1295 (Ct. App. 1990).

ANALYSIS

Intent.

Sufficiency of proof.

Intent.

Fraudulent intent was a necessary element of the crime of fraudulent procurement of food. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

Sufficiency of Proof.

Where defendant left restaurant without paying but there was no evidence that he did so in a surreptitious manner and he testified that he had merely forgotten to pay because he was intoxicated, there was no prima facie case of fraudulent intent and the evidence would not support a conviction. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

18-2406. Defenses. — (1) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.

(2) Where the property involved is that of the offender's spouse, no prosecution for theft may be maintained unless the parties were not living together as man and wife and were living in separate abodes at the time of the alleged theft.

(3) In any prosecution for theft committed by trespassory taking or the offense previously known as embezzlement, it is an affirmative defense that the property was appropriated openly and avowedly, and under a claim of right made in good faith. It is not a defense to a theft committed by such conduct that the accused intended to restore the property taken, but may be considered by the court to mitigate punishment if the property is voluntarily and actually restored (or tendered) prior to the filing of any complaint or indictment relating thereto, and this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against the accused.

(4) In any prosecution for theft by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

(5) It is no defense to a prosecution for theft under a provision of this chapter that the defendant, by reason of the same conduct, also committed an act specified as a crime in another chapter of title 18, or another title of the Idaho Code. [I.C., § 18-2406, as added by 1981, ch. 183, § 2, p. 319.]

Compiler's notes. Former § 18-2406 was repealed. See compiler's notes, § 18-2401.

The words enclosed in parentheses so appeared in the law as enacted.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Acting under invalid law.
Instructions.
Intent.
Ownership.
Set-off.

Acting Under Invalid Law.

City clerk assuming to act on behalf of city in collecting money under purported ordinance, and who converts such money to his own use, could not defeat prosecution for embezzlement on ground that ordinance was invalid. *State v. Dawe*, 31 Idaho 796, 177 P. 393 (1918).

Instructions.

Where a pickup truck was taken at night and, although defendant mailed the owner \$2.00 allegedly as consideration for the truck, no attempt was made to contact the owner about working out arrangements to pay for it even though defendant had been in possession of the vehicle for 12 days and had driven through several states before he was apprehended, where defendant had placed a stolen license plate on the vehicle and, when apprehended, told the police that his proof of purchase was in the mail and where defendant did not state that he had only intended to "temporarily" deprive the owner of possession but maintained simply that he had intended to pay for the vehicle or for the use of it, the trial court in a prosecution for grand larceny did not err in refusing to give a requested instruction on joy-riding. *State v. Pulliam*, 101 Idaho 482, 616 P.2d 261 (1980).

Court did not err in refusing to instruct the

jury on affirmative defense where the defendant's theory of the case was not that he made an appropriation; he never claimed ownership of the property at trial, but rather, he asserted that he never sought to exercise permanent control over the property. *State v. Boag*, 118 Idaho 944, 801 P.2d 1295 (Ct. App. 1990).

The court adequately instructed the jury on the defendant's theory of the case where the jury was told it could take into consideration whether or not the defendant honestly believed that he was entitled to spend and use monies in the manner in which he did under his authority and if there is a reasonable doubt as to whether the defendant appropriated the funds within the scope of his authority as personal representative, a verdict of not guilty should be returned. *State v. Boag*, 118 Idaho 944, 801 P.2d 1295 (Ct. App. 1990).

Intent.

Fact that there was coupled with misappropriation mere intention to restore embezzled property did not purge act of its criminal character or constitute defense to prosecution. *State v. Smith*, 48 Idaho 558, 283 P. 529 (1929).

Ownership.

That the property actually belonged to accused, was no defense to a prosecution for extortion. In *re Baum*, 32 Idaho 676, 186 P. 927 (1920).

Set-off.

Items in nature of a set-off do not constitute a defense to a charge of larceny or embezzlement. *State v. Cochrane*, 51 Idaho 521, 6 P.2d 489 (1931).

18-2407. Grading of theft. — Theft is divided into two (2) degrees, grand theft and petit theft.

(1) Grand theft.

(a) A person is guilty of grand theft when he commits a theft as defined in this chapter and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will:

1. Cause physical injury to some person in the future; or
2. Cause damage to property; or
3. Use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

(b) A person is guilty of grand theft when he commits a theft as defined in this chapter and when:

1. The value of the property taken exceeds one thousand dollars (\$1,000); or
2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; or
3. The property consists of a check, draft or order for the payment of money upon any bank, or a check, draft or order account number, or a financial transaction card or financial transaction card account number as those terms are defined in section 18-3122, Idaho Code; or
4. The property, regardless of its nature or value, is taken from the person of another; or
5. The property, regardless of its nature and value, is obtained by extortion; or
6. The property consists of one (1) or more firearms, rifles or shotguns; or
7. The property taken or deliberately killed is livestock or any other animal exceeding one hundred fifty dollars (\$150) in value.
8. When any series of thefts, comprised of individual thefts having a value of one thousand dollars (\$1,000) or less, are part of a common scheme or plan, the thefts may be aggregated in one (1) count and the sum of the value of all of the thefts shall be the value considered in determining whether the value exceeds one thousand dollars (\$1,000); or
9. The property has an aggregate value over fifty dollars (\$50.00) and is stolen during three (3) or more incidents of theft during a criminal episode. For purposes of this subparagraph a "criminal episode" shall mean a series of unlawful acts committed over a period of up to three (3) days; or
10. The property is anhydrous ammonia.

(2) Petit theft. A person is guilty of petit theft when he commits a theft as defined in this chapter and his actions do not constitute grand theft. [I.C., § 18-2407, as added by 1981, ch. 183, § 2, p. 319; am. 1982, ch. 272, § 1, p. 703; am. 1983, ch. 19, § 1, p. 54; am. 1987, ch. 84, § 1, p. 158; am. 1994, ch. 132, § 2, p. 301; am. 1994, ch. 346, § 21, p. 1089; am. 1998, ch. 326, § 1, p. 1054; am. 2000, ch. 243, § 1, p. 679; am. 2002, ch. 257, § 1, p. 747; am. 2002, ch. 326, § 1, p. 916.]

Compiler's notes. Former § 18-2407 was repealed. See Compiler's notes, § 18-2401.

This section was amended by two 2002 acts which appear to be compatible and have been compiled together.

The 2002 amendment by ch. 257, § 1, effective July 1, 2002, added subsection (1)(b)(10).

The 2002 amendment by ch. 326, § 1, effective July 1, 2002, in subsection (1)(b)(3), substituted "check, draft or order for the payment of money upon any bank, or a check, draft or order account number, or a financial transaction card or financial transaction card account number as those terms are defined in section 18-3122, Idaho Code" for "credit card".

Section 2 of S.L. 1982, ch. 272 is compiled as § 18-2409.

Sections 1 and 3 of S.L. 1994, ch. 132 are compiled as §§ 18-2402 and 18-3128, respectively.

Section 20 of S.L. 1994, ch. 346 is compiled as §§ 25-3519 — 25-3520 and 25-3521.

Section 2 of S.L. 1998, ch. 326 provided: "The provisions of this act [which amended this section] shall apply to violations of section 18-2407, Idaho Code, committed on and after July 1, 1998."

Sec. to sec. ref. This section is referred to in §§ 18-7038 and 18-7803.

Cited in: State v. Anderson, 102 Idaho 464, 631 P.2d 1223 (1981); State v. Hellberg, 105 Idaho 261, 668 P.2d 137 (Ct. App. 1983); Brown v. State, 108 Idaho 655, 701 P.2d 275 (Ct. App. 1985); State v. Bias, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986); State v. Cowger, 111 Idaho 825, 727 P.2d 1253 (Ct. App. 1986); State v. James, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986); State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987); State v. Chapman, 112 Idaho 1011, 739 P.2d 310 (1987); State v. Clayton, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987); Matthews v. State, 113 Idaho 83, 741 P.2d 370 (Ct. App. 1987); State v. Chacon, 114 Idaho 789, 760 P.2d 1205 (Ct. App. 1988); State v. Cirelli, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989); State v. Woodman, 116 Idaho 716, 779 P.2d 30 (Ct. App. 1989); State v. Boag, 118 Idaho 944, 801 P.2d 1295 (Ct. App. 1990); State v. Tomes, 118 Idaho 952, 801 P.2d 1303 (Ct. App. 1990); State v. Aubert, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991); State v. Weinmann, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992); State v. Marsh, 122 Idaho 854, 840 P.2d 398 (Ct. App. 1992); State v. Upton, 127 Idaho 274, 899 P.2d 984 (Ct. App. 1995); State v. Weaver, 127 Idaho 288, 900 P.2d 196 (1995); State v. Thomas, 133 Idaho 682, 991 P.2d 870 (Ct. App. 1999).

ANALYSIS

Consolidation of offenses.
Evidence sufficient for conviction.
Grand larceny.
Guilty plea.

Indictment and information.
Instructions.
Jurisdiction of Indian tribe.
Sentence.
Value of property.
— Sufficient evidence.

Consolidation of Offenses.

Where the amount of each welfare check exceeded \$150.00 (now \$300.00), the statutory minimum for classifying an offense as felony grand theft under subsection (1)(b)1. of this section, defendant was correctly charged with 35 separate offenses of welfare fraud for while a prosecutor may consolidate several misdemeanors into a single felony, it does not follow that he must consolidate several felonies into one larger felony. State v. Gilbert, 112 Idaho 805, 736 P.2d 857 (Ct. App. 1987).

Evidence Sufficient for Conviction.

On appeal from a conviction of grand theft, where the state's evidence showed that the defendant wanted to purchase a motor home from the victim, but credit problems arose which could not be resolved until the next day, and the victim loaned the defendant a pickup truck to be used overnight, and the defendant did not return the truck but instead drove it to Colorado, the jury could reasonably infer that the defendant intended to deprive the victim of the truck. State v. Decker, 108 Idaho 683, 701 P.2d 303 (Ct. App. 1985).

On appeal from a conviction of first degree burglary and grand theft, where the evidence showed that the codefendants were stopped by the police driving away from the scene of the crime with the stolen property in the car, and the defendants' defense was that a third party forced them to commit the crimes, but the defendants' version of the third party theory varied over time and was rebutted by the testimony of the third party, there was substantial evidence to support the jury verdict. State v. Kelling, 108 Idaho 716, 701 P.2d 664 (Ct. App. 1985).

Although defendant testified that the money shortages on the dates the grand thefts were alleged to have occurred were due to him holding money from the deposit so he could add it in to the proceeds of other days in order to boost sales performance and meet his cost budget on a daily basis in order to earn bonuses, from the evidence presented, the jury could properly infer that defendant appropriated the funds for his own use rather than to boost his sales on other dates. State v. Stricklin, 136 Idaho 264, 32 P.3d 158 (Ct. App. 2001).

Grand Larceny.

Motive is not an element of the crime of grand larceny. State v. Stoddard, 105 Idaho 533, 670 P.2d 1318 (Ct. App. 1983).

In prosecution for grand larceny of automo-

bile, it was reversible error to admit evidence that defendant had been charged with theft of another car as evidence of that charge was not relevant to question of his intent in the theft at issue; nor was such evidence admissible to show motive since issue of motive was not raised by defendant's plea of not guilty and was not otherwise raised in the case. *State v. Stoddard*, 105 Idaho 533, 670 P.2d 1318 (Ct. App. 1983).

Guilty Plea.

Where defendant made a plea agreement and agreed to plead guilty to petit theft under § 18-2403(3) and subsection (2) of this section and as part of his plea agreement the prosecutor agreed not to recommend incarceration, State did not breach plea agreement when it filed brief with appellate court urging affirmation of the sentence and of the magistrate's denial of Rule 35 relief as at the appeal stage the sentence was already pronounced and the State's role was no longer that of making a recommendation as to what would be an appropriate sentence. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

Indictment and Information.

Where the property was stolen at the same time from one individual, and, on the same day, the defendant and her associates transported all of the stolen property to the city outside of the Indian reservation, pawned one item there, and proceeded to the reservation where they were arrested, the defendant committed but one offense of possession of stolen property; accordingly, she was properly charged in the information with but one offense, and the amendment to the information adding the property recovered from the pawn shop under the same offense was permissible. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

The trial court did not err in permitting prosecutor to amend an information against defendant to include the charge of grand theft by obtaining control of stolen property where he was originally charged with grand theft. *State v. Seiber*, 117 Idaho 637, 791 P.2d 18 (Ct. App. 1989).

Instructions.

Where defendant was found guilty by a jury of the crime of wilful concealment, and at trial, the jury was instructed on the charged offense of petit theft and also on the lesser included offense of wilful concealment, the instructions that were given adequately addressed the subject matter of the requested instruction on the statutory definition of negligence as set forth in § 18-101(2). *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

Where defendant was found guilty of crime of wilful concealment an explanation of the

mental state, wilfulness, which is a requisite for guilt of the crime of wilful concealment, was given to the jury; the jury was instructed that in order to find defendant guilty of wilful concealment, they would have to find the state had proven beyond a reasonable doubt that defendant had wilfully concealed goods or merchandise belonging to store while still upon the premises of the store, and the jury was given a definition of "wilfully" which was drawn from, but did not recite in its entirety, the definition in § 18-101(1). These instructions were all that were required for the statutory definition of negligence in § 18-101(2), and § 18-101(2) was not the law that governed defendant's guilt or innocence. There was no need for an instruction giving that definition of negligence to support her defense that she did not act wilfully; her contention that she was merely negligent was properly a subject for closing argument, but did not necessitate a separate jury instruction. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

In prosecution for embezzlement and forgery, jury instructions which stated that to find defendant guilty of charge of theft by embezzlement each of the elements in the charge must be proven beyond a reasonable doubt that defendant with fraudulent intent appropriated funds belonging to her employer and applied these funds toward the purchase of lots 3 and/or 4 of a certain subdivision, were proper even though defendant contended that the instruction failed to address the requirement that the jury unanimously find, beyond a reasonable doubt, that defendant applied the moneys either to purchase of lot 3, lot 4, or both, and since the court gave a separate instruction defining "fraudulent intent" as well as instructions as to how a defense to embezzlement is shown and that its verdict must be unanimous and the elements of the crime embezzlement as given in the instructions were drawn from § 18-2403 and this section, the trial court fully instructed the jury on the elements which the state had to prove in order for the jury to reach a unanimous finding of guilt. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

Jurisdiction of Indian Tribe.

The tribal resolution which granted the state concurrent jurisdiction over the offenses, embezzlement, disturbing the peace, simple assault, kidnapping, vagrancy and receiving stolen property did not grant consent over a class of offenses which included grand theft by possession of stolen property. *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

Sentence.

A previously suspended, indeterminate seven-year sentence for grand theft was not excessive where the defendant pled guilty to

another grand theft, the presentence report showed several misdemeanor violations and, with the recent grand theft charge, three felony convictions, and moreover, he poorly performed in, and violated, both of the probation opportunities granted him. *State v. Sanchez*, 114 Idaho 387, 757 P.2d 250 (Ct. App. 1988), *aff'd*, 115 Idaho 776, 769 P.2d 1148 (1989).

The sentences imposed by the district court were reasonable and there was no basis to hold that the district court initially abused its discretion in ordering a grand theft sentence to be served consecutively to one imposed for issuing a check without sufficient funds. *State v. Teske*, 123 Idaho 975, 855 P.2d 60 (Ct. App. 1993).

Sentence of five years with a two-year minimum period of confinement for welfare fraud was reasonable, where defendant received food stamps without reporting income received from worker's compensation benefits, and where defendant had a lengthy criminal record. *State v. Baxter*, 124 Idaho 476, 860 P.2d 679 (Ct. App. 1993).

Although the sentence of 1 year in jail with 180 days suspended and 2 years probation imposed by the magistrate under a plea agreement to plead guilty to petit theft under § 18-2403(3) and subsection (2) of this section was stringent for a first offense, neither the sentence as imposed nor the denial of the defendant's Rule 35 motion for reduction of

sentence was an abuse of discretion where the magistrate concluded that defendant and his wife had been engaged in a carefully orchestrated scheme using their young son to assist in the theft of store merchandise. *State v. Stringer*, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

Value of Property.

—Sufficient Evidence.

Where store owner testified that the value of all of stolen property was approximately \$400, \$150 worth of which was recovered from under defendant's porch, and where jury could have reasonably inferred that defendant had helped dispose of all of the property that was not recovered, the evidence, and the justifiable inferences which could be drawn from it, supported a finding that the property over which defendant admitted exercising unauthorized control was of a value that exceeded the threshold value for grand theft. *State v. Fry*, 124 Idaho 71, 856 P.2d 108 (Ct. App. 1993).

Based on owner's testimony of value and testimony of sheriff as to value, there was substantial evidence upon which any rational trier of fact could have found that the fair market value of the stereo system exceeded \$300 at the time of the theft. *State v. Vandenacre*, 131 Idaho 507, 960 P.2d 190 (Ct. App. 1998).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Grand larceny.
Misdemeanor embezzlement.
Value of property taken.

Grand Larceny.

General rule regarding aggregation of values is that before the state can aggregate amounts taken from the same person in separate incidents for the purpose of charging grand larceny, it must show that the amounts were obtained pursuant to a common scheme or plan that reflected a single, continuing larcenous impulse or intent. The ultimate determination of whether a defendant is guilty of grand larceny because items stolen were in fact obtained in a single incident or pursuant to a common scheme or plan reflecting a single, continuing larcenous impulse or intent is for the jury to make. *State v. Lloyd*, 103 Idaho 382, 647 P.2d 1254 (1982).

Where two eyewitnesses observed defendant emptying parking meters, where the money found in several places in the automobile in which defendant was traveling was all loose change of the type one would expect to

come from parking meters, and where an officer testified that defendant himself confessed that he obtained a key in Salt Lake and came to Boise for the purpose of robbing parking meters, the jury could properly conclude from the evidence that the money found in the car came from parking meters in Boise and was the fruit of a plan hatched by defendant in Salt Lake, which would in turn support a conclusion that the money was obtained pursuant to a common scheme or plan reflecting a single, continuous larcenous impulse or intent. *State v. Lloyd*, 103 Idaho 382, 647 P.2d 1254 (1982).

Where stolen recorder, together with its price tag, was admitted on the basis of the testimony of a management employee who testified as to the authenticity of the tag and that from the price tag code he could approximate the market value of the article, the price tag met the test of relevance in that it, along with the verbal testimony, established the value of the stolen item, which was an essential element of the grand larceny charge. *State v. McPhie*, 104 Idaho 652, 662 P.2d 233 (1983).

Misdemeanor Embezzlement.

Since the reference to “feloniously stealing” in the former larceny statute included both felony and misdemeanor offenses, i.e. grand and petit larceny, the same was true of that language as used in the former embezzlement statute and a defendant could properly plead guilty to misdemeanor embezzlement. *Sparrow v. State*, 102 Idaho 60, 625 P.2d 414 (1981).

Value of Property Taken.

Where a property invoice listing the items which police recovered from defendant when he was apprehended in connection with bur-

glary showed that business’ money bag contained \$67.00 and that waitress’ purse contained \$109.46, and where manager of burglarized restaurant testified that \$96.00 was missing while waitress testified that she left purse, with money in it, at restaurant on night of burglary, this evidence could have led the jury to conclude, beyond a reasonable doubt, that the value of the property taken from the premises exceeded \$150 and there was substantial, competent evidence to support conviction of grand larceny. *State v. Regester*, 106 Idaho 296, 678 P.2d 88 (Ct. App. 1984).

18-2408. Punishment for theft. — (1) Grand theft committed in a manner prescribed in subsection (1)(a) of section 18-2407, Idaho Code, is a felony punishable by fine not exceeding ten thousand dollars (\$10,000) or imprisonment in the state prison for not less than one (1) year nor more than twenty (20) years, or by both such fine and imprisonment.

(2)(a) Grand theft committed in a manner prescribed in subsection (1)(b)1., 2., 3., 4., 5., 6., 8., 9. or 10. of section 18-2407, Idaho Code, or a felony committed in a manner prescribed in section 18-2415, Idaho Code, is a felony punishable by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in the state prison for not less than one (1) year nor more than fourteen (14) years, or by both such fine and imprisonment.

(b) Grand theft committed in a manner prescribed in subsection (1)(b)7. of section 18-2407, Idaho Code, is a felony punishable by a fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000), and the minimum fine shall not be suspended or withheld, or by imprisonment in the state prison for not less than one (1) year nor more than fourteen (14) years, or by both such fine and imprisonment. In addition, the court shall assess civil damages as provided in section 25-1910, Idaho Code.

(3) Petit theft is a misdemeanor punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding one (1) year or by both. [I.C., § 18-2408, as added by 1981, ch. 183, § 2, p. 319; am. 1983, ch. 19, § 2, p. 54; am. 1987, ch. 84, § 2, p. 158; am. 1995, ch. 216, § 1, p. 754; am. 2001, ch. 112, § 2, p. 401; am. 2002, ch. 257, § 2, p. 747; am. 2002, ch. 289, § 1, p. 837.]

Compiler’s notes. Former § 18-2408 was repealed. See compiler’s notes, § 18-2401.

This section was amended by two 2002 acts which appear to be compatible and have been compiled together.

The 2002 amendment by ch. 257, § 2, effective July 1, 2002, in subsection (2)(a), inserted “or 10.” following “9.”

The 2002 amendment by ch. 289, § 1, effective July 1, 2002, in subsection (2)(a), inserted “is a felony committed in a manner prescribed in section 18-2415, Idaho Code” following

“section 18-2407, Idaho Code.”

Section 3 of S.L. 1983, ch. 19 is compiled as § 25-1910.

Section 1 of S.L. 2001, ch. 112 is compiled as § 18-2403.

Section 2 of S.L. 1995, ch. 216 declared an emergency. Approved March 17, 1995.

Section 3 of S.L. 2001, ch. 112 declared an emergency. Approved March 22, 2001.

Sec. to sec. ref. This section is referred to in §§ 18-2415 and 26-1206.

Cited in: *State v. Sutton*, 106 Idaho 403,

679 P.2d 680 (Ct. App. 1984); *State v. Kelling*, 108 Idaho 716, 701 P.2d 664 (Ct. App. 1985); *Stone v. State*, 108 Idaho 822, 702 P.2d 860 (Ct. App. 1985); *State v. Russell*, 109 Idaho 723, 710 P.2d 633 (Ct. App. 1985); *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986); *State v. Clayton*, 112 Idaho 1110, 739 P.2d 409 (Ct. App. 1987); *State v. Hall*, 114 Idaho 887, 761 P.2d 1239 (Ct. App. 1988); *State v. Cirelli*, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989); *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989); *State v. Woodman*, 116 Idaho 716, 779 P.2d 30 (Ct. App. 1989); *State v. Phillips*, 121 Idaho 261, 824 P.2d 192 (Ct. App. 1992).

ANALYSIS

Discretion of court.

Excessive sentence.

Reinstatement of sentence.

Sentence.

—Hearing.

—Maximum penalty not imposed.

—Not excessive.

—Proper.

Rehabilitative treatment considered.

Discretion of Court.

Where the court concluded that defendant's antisocial personality, as detailed in the psychiatric report, aggravated by the tendency of alcohol to further reduce inhibitions, compelled the conclusion that defendant must be regarded as a menace to society, and defendant was therefore sentenced to an indeterminate term not to exceed 14 years in the Idaho state penitentiary, the sentence for grand larceny imposed by the trial court was not excessive nor an abuse of discretion. *State v. Stroup*, 101 Idaho 54, 607 P.2d 1328 (1980).

Ten years of probation given to defendants for grand theft by defrauding an insurance company was not an abuse of discretion by the court where the term of probation was reasonably related to the time which might be required to perform the restitution obligation and where the court provided for early discharge of probation if restitution should be earlier completed. *State v. Cromer*, 116 Idaho 925, 782 P.2d 48 (Ct. App. 1989).

The district judge did not abuse his discretion by imposing two concurrent sentences, consisting of two years fixed and six years indeterminate, without retaining jurisdiction for first-degree burglary and grand theft where defendant had recently turned 18 years old at the time of the burglary, and he and his accomplice burglarized the home involved, at night, on more than one occasion, took many miscellaneous items from the home and pawned some of them and "trashed" others and the presentence report indicated that defendant had committed various offenses as a juvenile which were equivalent to

first-degree burglary, grand theft, probation violation and other crimes. *State v. Christensen*, 121 Idaho 769, 828 P.2d 332 (Ct. App. 1992).

Where defendant was an 18-year-old college student with no prior felony convictions but the presentence report disclosed juvenile offenses, including theft of radios from state and county owned vehicles, as well as seven probation violations and a commitment to the custody of the Department of Health and Welfare, the unified sentence of eight years, with two years fixed, for conviction of first-degree burglary and theft, was not an abuse of discretion. *State v. Auger*, 121 Idaho 770, 828 P.2d 333 (Ct. App. 1992).

Excessive Sentence.

Where at the time of the sentencing, defendants were 21 and 20 years of age, respectively, and where their presentence reports, and earlier psychological reports portrayed two young men with very low IQ's, either or both of the defendants should have been able to benefit, if at all, from what rehabilitative programs were available, within a 14-year period; therefore under these circumstances, to impose a sentence which was more than double the length of their current natural lives was excessive and unduly harsh. *State v. Dunnagan*, 101 Idaho 125, 609 P.2d 657 (1980).

Reinstatement of Sentence.

Reinstatement of defendant's two-year sentence for grand theft was not unreasonable where defendant had a long prior record, and had previously absconded from parole in Oregon. *State v. New*, 123 Idaho 168, 845 P.2d 586 (Ct. App. 1993).

Sentence.

—Hearing.

In prosecution for grand theft, evidence implicating the defendant in other burglaries in the area was relevant to the defendant's sentencing and was admissible at the sentencing hearing. *State v. Cowger*, 111 Idaho 825, 727 P.2d 1253 (Ct. App. 1986).

—Maximum Penalty Not Imposed.

Imposition of indeterminate and concurrent sentences of 15 years for first-degree burglary and 14 years for grand theft were not the maximum possible penalties; they were indeterminate rather than fixed, and concurrent rather than consecutive. *State v. Hawkins*, 115 Idaho 719, 769 P.2d 596 (Ct. App. 1989), *aff'd*, 117 Idaho 285, 787 P.2d 271 (1990), *aff'd*, 117 Idaho 285, 787 P.2d 271 (1990).

—Not Excessive.

The defendant's fixed five-year sentence for theft and a consecutive indeterminate sentence of five years for burglary were not

excessive where at the time of sentencing, the defendant was 30 years old, since the age of 16 he had engaged in a robbery, numerous burglaries, several thefts, and two acts of receiving stolen property, he had served time and had violated parole in another state, and was on parole when he came to this state and committed the instant offenses. *State v. Amerson*, 113 Idaho 183, 742 P.2d 438 (Ct. App. 1987).

Where the defendant entered guilty pleas to three counts of grand theft, one count of second degree burglary, two counts of petty theft, and one count of escape from a county jail and received a series of indeterminate sentences, some concurrent and some consecutive, aggregating a total of 15 years, his sentences were not excessive, even though he portrayed his part in the criminal proceedings after the escape as that of an unwilling participant, where the sentences were well within the maximum penalties which the judge could have imposed, the judge took into consideration the defendant's character, including the testimony of witnesses who spoke in his behalf, judge considered the seriousness of the crimes, and the impact lesser sentences would have on the defendant and society, and the judge reasoned that although the defendant may have been coerced into escaping, he undertook the escape under his own free will, and could have departed from his fellow escapees several times during their flight. *State v. Chacon*, 114 Idaho 789, 760 P.2d 1205 (Ct. App. 1988).

A sentence of nine months confinement for conviction of grand theft was not unreasonable in light of defendant's prior felony conviction and revocation of a previous probation along with the fact that the theft was committed while defendant was on probation. *State v. Birky*, 122 Idaho 1170, 832 P.2d 1170 (Ct. App. 1992).

For grand theft, a sentence of five years with a minimum confinement period of two years was reasonable, where defendant was involved in a "scam" which conned victims into paying for nonfunctional pay phones, and defendant had a prior record and a history of being a fugitive from justice in other jurisdictions. *State v. Johnston*, 123 Idaho 222, 846 P.2d 224 (Ct. App. 1993).

Defendant's unified sentence of 14 years with a minimum three-year term of incarceration for burglary, grand theft, and malicious injury to property was not excessive where defendant, after breaking into his employer's building and stealing a wrecker, led police on a dangerous, high-speed chase that ended only when he crashed the truck into a police blockade. *State v. Tucker*, 123 Idaho 374, 848 P.2d 432 (Ct. App. 1993).

Defendant's sentences for grand theft were not unjust although his codefendants received

"lesser" sentences where defendant had a prior felony record while his codefendants did not. *State v. Westmoreland*, 123 Idaho 980, 855 P.2d 65 (Ct. App. 1993).

—Proper.

The trial court did not err in sentencing the defendant to a three-year indeterminate term of imprisonment for each of eight counts of drawing checks with insufficient funds and one seven-year indeterminate term of imprisonment on grand theft conviction to run consecutive to the other terms, where defendant had prior criminal record and was out on bond when grand theft occurred. *State v. Brewster*, 106 Idaho 145, 676 P.2d 720 (1984).

In an appeal from convictions of grand theft under § 18-2403(4) and acting as an accessory to grand theft pursuant to § 18-2403(4), the trial court's imposition of a four-year indeterminate sentence for the first count, under this section, and a concurrent two-year indeterminate sentence for the second count, pursuant to § 18-206, was not unduly harsh where, although the defendant was only 18 years old, he had a record consisting of minor traffic violations and a possession of marijuana charge, and where the presentence report showed that the defendant was involved with marijuana and cocaine, that the defendant had sought to obtain \$500 from the rightful owners of stolen snowmobile for information leading to its return, had offered to sell a stolen snowmobile to a neighbor, and had engaged in a number of other criminal activities. *State v. Mason*, 107 Idaho 706, 692 P.2d 350 (1984).

Three-year indeterminate sentence for grand theft conviction did not represent an abuse of discretion where the presentence report showed that the defendant had been convicted previously of four felonies and six misdemeanors. *State v. Bowman*, 106 Idaho 446, 680 P.2d 868 (Ct. App. 1984).

Where court believed that defendant's drug dependency would result in future criminal conduct, that protecting society was the most pressing consideration, and that in light of defendant's conduct and prior record, retribution and deterrence would be furthered by a fixed term of confinement, the court did not abuse its discretion in sentencing defendant to a fixed seven-year sentence for burglary and to a five-year indeterminate sentence for grand theft. *State v. Heistand*, 107 Idaho 218, 687 P.2d 1001 (Ct. App. 1984).

A sentence of indeterminate 12-year terms for each of two grand theft charges and an indeterminate five-year term for second degree burglary conviction, with all sentences to run concurrently, was not excessive, where the measure of confinement was treated as four years, one-third of an indeterminate sentence, and defendant had a long history of

alcohol and drug abuse, as well as prior confrontations with the law. *State v. Brandt*, 109 Idaho 728, 710 P.2d 638 (Ct. App. 1985).

Where the concurrent ten-year sentences were well within the district court's authority, defense counsel recommended such sentences, and the record contained no suggestion that counsel acted against his client's interests or otherwise provided ineffective assistance, the sentences were invited and would not be disturbed on appeal. *State v. Griffith*, 110 Idaho 613, 716 P.2d 1385 (Ct. App. 1986).

The trial court did not abuse its discretion in sentencing the defendant to an indeterminate ten-year sentence for grand theft where the defendant had two prior felony convictions for burglary and numerous misdemeanor offenses, and at the time of the present offense, the defendant was on probation for first-degree burglary. *State v. Virgo*, 110 Idaho 828, 718 P.2d 1266 (Ct. App. 1986).

The 10-year indeterminate sentence for grand theft did not represent an abuse of the district judge's discretion, where the defendant stole a pickup truck valued substantially in excess of \$150.00, he was under the influence of alcohol and marijuana at the time of the theft, a presentence investigation disclosed that he was a chronic alcoholic and substance abuser, and he had been convicted in other jurisdictions of numerous felony offenses, including burglary, forgery and embezzlement. *State v. Darnell*, 111 Idaho 825, 725 P.2d 201 (Ct. App. 1986).

The district court did not abuse its discretion in imposing a 14-year indeterminate sentence on the defendant who pleaded guilty to one count of grand theft, where the defendant had a long history of criminal activity, and at the time of the sentencing, another burglary charge was pending against him. *State v. Cowger*, 111 Idaho 825, 727 P.2d 1253 (Ct. App. 1986).

The court did not abuse its discretion where the defendant was sentenced to a three-year indeterminate sentence for grand theft. *State v. Hathaway*, 111 Idaho 844, 727 P.2d 1272 (Ct. App. 1986).

An indeterminate sentence of five years for grand theft was not improper where the defendant failed to show an abuse of discretion. *State v. Nooner*, 114 Idaho 654, 759 P.2d 945 (Ct. App. 1988).

The court did not abuse its discretion in giving an indeterminate 14-year sentence to a grand theft defendant where defendant had a long history of crime, had been given many opportunities for rehabilitation which had been of little avail, and, while awaiting trial, had tested positive for marijuana use. This prior history and drug use problem warranted incarceration for the protection of society. *State v. Ramsey*, 115 Idaho 717, 769 P.2d 594

(Ct. App. 1989) (decision prior to enactment of § 19-2513).

Imposing a sentence of three years in prison with a minimum one-year confinement period for second-degree burglary, and a concurrent one-year sentence for petit theft for shoplifting \$42.00 worth of meat was not excessive where defendant had a lengthy record of shoplifting and other crimes, and defendant had made a commitment to rehabilitation after one of her prior convictions, yet no rehabilitation had occurred. *State v. Palacios*, 115 Idaho 901, 771 P.2d 919 (Ct. App. 1989).

The court properly denied a motion for a reduction of sentence by defendant convicted of possession of controlled substance with intent to deliver and of theft by possession of stolen property where defendant was sentenced to concurrent, unified sentences of seven years with three years minimum confinement and of five years with three years minimum confinement, and where these sentences were well within the statutorily permitted maximum penalties. *State v. Garcia*, 115 Idaho 559, 768 P.2d 822 (Ct. App. 1989).

Judge did not abuse his discretion in sentencing defendant, convicted of grand theft for shooting a cow and appropriating the two hindquarters therefrom, to a term not to exceed eight years with a three-year minimum period of confinement; the judge took defendant's crime, his past criminal activity and his potential for rehabilitation, and balanced them against the need to protect society. *State v. Johnson*, 117 Idaho 650, 791 P.2d 31 (Ct. App. 1990).

Grand theft defendant, sentenced to three years determinate followed by six years indeterminate, was not given an excessive sentence where the sentence was within statutory constraints and the defendant had a long history of criminal violations, both as a juvenile and as an adult. *State v. Pena*, 117 Idaho 187, 786 P.2d 578 (Ct. App. 1990).

Defendant was sentenced to five years with three years' minimum confinement on each burglary charge and to eight years with four years' minimum confinement on each grand theft offense and where defendant had pled guilty to avoid eight additional felony counts and had a lengthy juvenile record, the sentences imposed were reasonable, and the district court did not abuse its sentencing discretion. *State v. Rocklitz*, 120 Idaho 703, 819 P.2d 121 (Ct. App. 1991).

Where the court determined that defendant in a grand theft case was lying and imposed a sentence of seven years indeterminate with two and one-third years to be the probable term of confinement to punish him for his crime and to protect society, and the judge's comments on defendant's itinerant lifestyle, lack of employment, and lack of connection to

the area reflect the court's concern that defendant would not be a good probation risk, the sentence was reasonable under the circumstances of this case. *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

Unified fourteen-year sentence, with four years minimum confinement for grand theft charges was reasonable, where defendant had a considerable criminal record including prior convictions for assault and rape. *State v. Whitcher*, 124 Idaho 478, 860 P.2d 681 (Ct. App. 1993).

Unified sentence of fifteen-year indeterminate term with nine years minimum confinement for burglary and grand theft was reasonable, where defendant had an extensive past history of burglary and theft. *State v. Gawron*, 124 Idaho 625, 862 P.2d 317 (Ct. App. 1993).

Once defendant violated the terms of his probation, the district court was not bound by the plea agreement that stated defendant's disposition was to be a withheld judgment with five years on probation, and the court was free to sentence defendant to a period of incarceration within the statutory maximum for grand theft. *Short v. State*, 135 Idaho 40, 13 P.3d 1253 (Ct. App. 2000).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Sentence.

- Excessive.
- In general.
- No abuse of discretion.

Sentence.

Sentencing court could properly consider defendant's 33 arrests in the state of Washington in the 31 months prior to arrest in Idaho, which arrests included arrest for a felony reduced to a misdemeanor and 30 other traffic offenses to which defendant pleaded guilty, as well as pending charges for battery, resisting arrest and possession of stolen property; thus imposition of an indeterminate term not to exceed seven years which was one-half of the maximum sentence allowable for grand larceny under former law providing for punishment for grand larceny was proper. *State v. Ott*, 102 Idaho 169, 627 P.2d 798 (1981).

—Excessive.

Upon appeal of conviction of receiving stolen property and sentence of five years in the state prison, in view of the meagerness of the testimony as to defendant's guilt and the comparative value of the stolen property received, the sentence was held excessive and

Rehabilitative Treatment Considered.

Where co-defendants convicted of burglary and grand theft both claimed that the district court abused its discretion by refusing to retain jurisdiction to allow them to obtain rehabilitative treatment for their respective alcohol abuse problems, but the district court had before it the presentence investigation reports which indicated that both co-defendants had extensive prior criminal records, the court properly concluded that both men would likely fail on any type of probation program and noted the importance of protecting society from them; the court also expressed its concern for both defendants' alcoholism and drug problems and recommended that both defendants be afforded the benefit of the alcohol and drug abuse counseling programs available in the penitentiary, thereby properly considering the relevant sentencing factors, and indicating no abuse of discretion in refusing to retain jurisdiction. *State v. Smith*, 119 Idaho 233, 804 P.2d 1364 (Ct. App. 1991).

reduced the three months in the county jail and a fine of \$500. *State v. Constanzo*, 76 Idaho 19, 276 P.2d 959 (1954).

—In General.

Where presentence report indicated two prior felonies concerning grand larceny of livestock and sentence imposed was indeterminate term of seven years, which was well within statutory limit of former law dealing with grand larceny, the sentencing court did not abuse its discretion in sentencing. *State v. Bartholomew*, 102 Idaho 106, 625 P.2d 1109 (1981).

—No Abuse of Discretion.

Where the trial court considered appellant as the person primarily responsible for the commission of the offense involved, being aided in its decision by a pre-sentence investigation, there was no abuse of discretion in a sentence of no more than 10 years in the Idaho State Penitentiary, where the maximum term was 14 years, such sentence being neither extreme nor excessive. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

Trial court did not abuse its discretion in sentencing defendant to five years' imprisonment for the grand larceny of 86 pigs. *State v. Cliett*, 96 Idaho 646, 534 P.2d 476 (1975).

18-2409. Pleading and proof. — (1) Where it is an element of the crime charged that property was taken from the person or obtained by extortion, an indictment, complaint or information for theft must so specify. In all other cases, an indictment, information or complaint for theft is sufficient if it alleges that the defendant stole property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which such property was stolen or the particular theory of theft involved.

(2) Proof that the defendant engaged in any conduct constituting theft as defined in section 18-2403, Idaho Code, is sufficient to support any indictment, information or complaint for theft other than one charging theft by extortion. An indictment, complaint or information charging theft by extortion must be supported by proof establishing theft by extortion. [I.C., § 18-2409, as added by 1981, ch. 183, § 2, p. 319; am. 1982, ch. 272, § 2, p. 703.]

Compiler's notes. Former § 18-2409 was repealed. See compiler's notes, § 18-2401.

Section 1 of S.L. 1981, ch. 183 contained a repeal and § 3 is compiled as § 18-1401.

Section 1 of S.L. 1982, ch. 272 is compiled as § 18-2407.

Cited in: State v. Henderson, 113 Idaho 411, 744 P.2d 795 (Ct. App. 1987).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Evidence.

- Drawing checks without funds.
- Embezzlement.
- Extortion.
- False pretenses.
- Fraudulent intent.
- Larceny.

Indictment and information.

- Embezzlement.
- Extortion.
- False pretenses.
- Larceny.
- Receiving stolen property.
- Theft.
- Variance.

Intent.

Presumption of value.

- Larceny.

Proof.

- False pretenses.
- Receiving stolen property.

Search warrant.

Venue.

- Larceny.

Wife as abettor.

Evidence.

— Drawing Checks Without Funds.

Evidence of previous checks issued without funds, shortly before check in issue, was admissible as to his intent to defraud. State v. Sedam, 62 Idaho 26, 107 P.2d 1065 (1940).

Where there was a conflict in evidence as to

date check was given, date merchandise was purchased for which check was given, and as to whether instructions had been given to hold check a few days, such matters were within exclusive province of the jury. State v. Eikelberger, 72 Idaho 245, 239 P.2d 1069 (1951).

— Embezzlement.

Intent of embezzlement might have been established either by direct or circumstantial evidence. Evidence of secretion was competent. State v. Sage, 22 Idaho 489, 126 P. 403, 1914B Ann. Cas. 251 (1912).

The late disclosure of a document revealing that money was missing from the clerk's office which had not been handled by defendant was prejudicial, where the premise of the state's case against defendant was that he had received money from the sheriff's office and subsequently failed to deliver the money to the clerk's office, where the evidence introduced by the state showed that he had purportedly signed for the money and that the clerk's office had no record of receiving the money from defendant, and where the state asked the jury to infer from these facts that since the money was missing from the clerk's office, defendant was the responsible party. State v. McCoy, 100 Idaho 753, 605 P.2d 517 (1980).

Evidence that the defendant sold a shotgun intending to retain the proceeds, that he was not authorized to sell it, that he had purchased a second inoperative shotgun before

he sold the first gun and therefore could not have intended the second gun to be a replacement shotgun and that defendant's purchase of a third shotgun over a year later was prompted only by the mayor's demand that he return the city's shotgun was sufficient to sustain a conviction. *State v. Burris*, 101 Idaho 683, 619 P.2d 1136 (1980).

Evidence that a private citizen, purchased a pearl-handled revolver from the defendant and sold the gun to his father-in-law approximately two days later and testimony which firmly established that the revolver in question belonged to the city police force was sufficient to support a conviction of embezzlement. *State v. Burris*, 101 Idaho 683, 619 P.2d 1136 (1980).

Evidence that defendant sold pistol which was bought by a city police officer and turned over to defendant police chief after officer's death was sufficient to support conviction of embezzlement regardless of whether pistol belonged to officer or city. *State v. Burris*, 101 Idaho 683, 619 P.2d 1136 (1980).

—Extortion.

In a prosecution for obtaining a check in settlement of buyer's claim for breach of warranty through threats of injury to person and property of seller, evidence of an unconditional guarantee and that property sold was defective, was inadmissible. *State v. Phillips*, 62 Idaho 656, 115 P.2d 418 (1941).

Where evidence showed that agent of defendant corporation, which operated a bill collection service, used threat of prosecution for a crime as a collection tactic, it was error to instruct jury that defendant corporation could be found guilty if jury found agent was acting within the scope of his authority; the corporation could not be bound by the actions of its agent unless the agent's acts were authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. *State v. Adjustment Dep't Credit Bureau, Inc.*, 94 Idaho 156, 483 P.2d 687 (1971).

—False Pretenses.

Newspaper advertisements by the defendant, which was the means of bringing the parties together, and readings by defendant or fortune-teller mailed to prosecuting witness and another, are admissible in evidence. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

False pretenses may be established by circumstantial evidence. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

Acts, statements and conduct of coconspirator were admissible against defendant, though not occurring in his presence, where parties were working together to accomplish a

common purpose, to-wit, the obtaining of money by false pretenses. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

Package containing candy bars valued at \$5 was properly admitted in evidence against defendant charged with obtaining money under false pretenses, where evidence showed that other persons connected with crime and acting in conjunction with defendant represented to prosecuting witness that package contained articles valued at \$5,000. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

Admission of proof of statements and acts of coconspirators prior to proof of conspiracy is discretionary with the court, since either the acts or the conspiracy may be proved first, if one on trial is subsequently shown to be connected with crime and conspiracy. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

—Fraudulent Intent.

Where defendant had acted openly in informing his former employer that he would not return various tools in his possession which belonged to employer until a wage dispute was settled, there was not sufficient evidence from which the jury could have concluded beyond a reasonable doubt that defendant had a fraudulent criminal intent, and therefore the trial court erred in refusing to grant defendant's motion for judgment of acquittal. *State v. Gowin*, 97 Idaho 766, 554 P.2d 944 (1976).

—Larceny.

The proof that victim had possession of money or property was in general sufficient proof of ownership. *State v. Brill*, 21 Idaho 269, 121 P. 79 (1912).

In a prosecution for receiving stolen calves where the sheriff as state's witness interjected a response beyond the scope of defense counsel's cross-examination which prejudicially inferred that defendant was involved in similar larcenous acts, the trial court erred in overruling defendant's motion to strike that portion of the sheriff's testimony and in overruling defendant's objection to the state's redirect interrogation of the sheriff concerning the unelicited answers. *State v. Trowbridge*, 97 Idaho 93, 540 P.2d 278 (1975).

Where the evidence was insufficient to establish the defendant's intent at the time of the taking of several cattle or to rebut his assertion that his shipment of the stray cattle was other than an honest mistake, a jury verdict of conviction could not be sustained. *State v. Erwin*, 98 Idaho 736, 572 P.2d 170 (1977).

Indictment and Information.

Information which charged sheriff of a county with wilfully, unlawfully, fraudulently, and feloniously appropriating to his own use certain money to him in an official capacity

was sufficient. *State v. Steers*, 12 Idaho 174, 85 P. 104 (1906).

Series of conversions by one occupying fiduciary position may constitute single continuing offense of embezzlement, and in charging them as such it is not necessary to allege that the series of acts was systematically instituted and carried on, or that the specific separate peculations cannot be identified. *State v. Peters*, 43 Idaho 564, 253 P. 842 (1927).

An information or indictment which did not specifically list the property the defendant was charged with taking, failed to meet the statutory and constitutional requirements of specificity. *State v. Gumm*, 99 Idaho 549, 585 P.2d 959 (1978).

—Embezzlement.

Where one systematically instituted a continuous series of withholding of his principal's money for purpose of acquiring for his own use ultimately a large sum, the series of acts constituted but one offense, namely, embezzlement of aggregate amount. *State v. Dawe*, 31 Idaho 796, 177 P. 393 (1918).

Allegations of demand and nonpayment were not essential for crime of embezzlement. *State v. White*, 46 Idaho 124, 266 P. 415 (1928).

—Extortion.

Since the crime of extortion is in fact a felony, there was no error in the use of the word "feloniously" in the information charging such crime. *State v. Adjustment Dep't Credit Bureau, Inc.*, 94 Idaho 156, 483 P.2d 687 (1971).

—False Pretenses.

An information charging that prosecuting witness paid \$200.00 in consideration of receiving employment and believing false and fraudulent pretense in connection therewith he was deceived and induced to part with such \$200.00, stated an offense under former law regarding obtaining labor under false pretenses. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

Where information charged several alleged false pretenses, a conviction might be had on proof of any one, provided it was material in inducing the prosecuting witness to part with his money. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

Evidence justified conviction of defendant for obtaining money under false pretenses where evidence showed that defendant in conjunction with others obtained \$5,000 from prosecuting witness on representation that package contained valuable parcels when as a matter of fact it only contained candy bars valued at \$5. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

—Larceny.

Information charging, in the language of former statutes, felonious taking of two mares, property of B, from a range in a certain county, was sufficient. *State v. Rathbone*, 8 Idaho 161, 67 P. 186 (1901).

Whether it was necessary to allege in information charging larceny from the person, value of property taken, was a question of the sufficiency of the information, and did not go to jurisdiction of court. Only manner in which such question could have been raised was by demurrer to information, at trial under plea of not guilty, or after trial in arrest of judgment. *In re Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911).

The charging part of information must name person charged, state what was stolen by that particular person, where, and when. *State v. Flower*, 27 Idaho 223, 147 P. 786 (1915).

Word "steal" has fixed and well-defined meaning and in its common everyday use is well understood. Use of such word in indictment without addition of word "feloniously" will not vitiate it. *State v. Basinger*, 46 Idaho 775, 271 P. 325 (1928).

Ownership of stolen property need not be alleged with precision where the alleged crime caused an injury to another. *State v. Kenworthy*, 68 Idaho 312, 193 P.2d 838 (1948).

An indictment for larceny which alleges title to the articles stolen to be in P. I. Company was sufficient without alleging that the company was a corporation or a partnership or an entity capable of owning title to property. *State v. Kenworthy*, 68 Idaho 312, 193 P.2d 838 (1948).

—Receiving Stolen Property.

Information did not charge more than one offense, since it was not inconceivable or unreasonable that one who bought or received property with the intent of his own gain may have had at same time and as part of transaction an intent to prevent owner from again possessing it. *State v. Hagan*, 47 Idaho 315, 274 P. 628 (1929).

It was unnecessary to allege that defendant received stolen property for sake of his own gain and to prevent owner from again possessing his property. Allegation of either intent was sufficient. *State v. Montgomery*, 48 Idaho 760, 285 P. 467 (1930).

Information need only charge offense as defined by statute or in language of equivalent import. *State v. Montgomery*, 48 Idaho 760, 285 P. 467 (1930).

—Theft.

In prosecution for theft and grand theft defendant was not prejudiced by state's reliance on subsection (1) of this section, for although the statute relieved the state from

alleging in the information the theories of theft involved, the details of the crimes were made available to defendant by way of the preliminary hearings held on the charges. *State v. Owen*, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997).

—Variance.

Information charging C to be owner of the stolen property was supported by proof that C was in possession as agent of owner with power of sale and disposition. *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

An information alleging C. to be the owner of the stolen property was supported by proof showing that he was in possession of the property as agent of the real owner with full power to sell or otherwise dispose of the same. *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

Information charging larceny of two mares from G.M.B. was supported by proof that mares were property of G.M.B. and R.L.B. *State v. Rathbone*, 8 Idaho 161, 67 P. 186 (1901).

Information for larceny which alleged title to thing stolen to be in B was supported by proof of property in the firm of B & J. *State v. Ireland*, 9 Idaho 686, 75 P. 257 (1904).

There was no material variance where information charges that thing stolen was property of C.W.D., when in fact, it belonged to C.D., and it was nowhere shown that C.W.D. and C.D. were not the same person. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

Where charge is that animals taken were "geldings," it was not necessary to show that horses stolen were actually "geldings." *State v. Brassfield*, 40 Idaho 203, 232 P. 1 (1925).

Intent.

In cases of embezzlement by public and corporate officers, circumstantial evidence is often only means of establishing ultimate fact of guilt; conclusion of guilt need not necessarily follow from circumstances in proof but may be obtained therefrom by probable deductions. *State v. Jester*, 46 Idaho 561, 270 P. 417 (1928); *State v. Smith*, 48 Idaho 558, 283 P. 529 (1929).

Since crime of embezzlement depended upon existence of criminal intent, wide scope was given to evidence which might have been introduced by state to show fraudulent or criminal intent or on behalf of defense to show absence thereof. *State v. Smith*, 48 Idaho 558, 283 P. 529 (1929).

Presumption of Value.

—Larceny.

Upon prosecution for larceny of check for a certain amount of money, no proof of actual

value is required, as law presumes that the face value of check is the actual value. *State v. Bogris*, 26 Idaho 587, 144 P. 789 (1914).

Proof.

—False Pretenses.

The prosecution did not have to prove that the defendant received the exact amount of money charged in the information; the amount of money received was not descriptive of any essential ingredient of the offense. *State v. Sheehan*, 33 Idaho 553, 196 P. 532 (1921).

Where alleged false pretenses are oral they must be proved by testimony of two witnesses or one witness and corroborating circumstances. *State v. Whitney*, 43 Idaho 745, 254 P. 525 (1927).

—Receiving Stolen Property.

In prosecution for receiving stolen wool state must show beyond reasonable doubt that the wool in possession of defendant was the same wool or part of the wool allegedly stolen. *State v. Rankin*, 56 Idaho 64, 50 P.2d 3 (1935).

Search Warrant.

Where search warrant described premises to be searched as "the Club" not excluding any part thereof, trial court was justified in considering the warrant good as to "a place under the Club" where the search was made only in the basement of such club, and evidence, which resulted in a conviction for receiving stolen property, was properly admitted. *State v. Constanzo*, 76 Idaho 19, 276 P.2d 959 (1954).

Venue.

—Larceny.

Evidence as to acts of appellant in aiding to load a steer into a truck after the steer had been killed, dressing the steer out, and transporting it to the South Fork Lodge, with intent to deprive the owner of his property, was sufficient to establish appellant as a principal within the meaning of § 18-204, and as principal he could be tried in either the county in which the steer was stolen or that in which the Lodge was located. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

Wife as Abettor.

Finding stolen goods taken by husband at the home was insufficient to convict wife as an abettor. *State v. Flower*, 27 Idaho 223, 147 P. 786 (1915).

18-2410. Prohibiting defacing, altering or obliterating numbers — Sales prohibited — Penalty. — (1) Any person who, with intent to deceive or defraud others, shall deface, alter, remove, cover, destroy or obliterate the manufacturer's serial or identification number on any item of property shall be guilty of a felony.

(2) Any person or persons who, with intent to deceive or defraud others, knowingly disposes of, sells, trades or barter, or offers to dispose of, sell, trade or barter any item of property on which the manufacturer's serial or identification number has been defaced, altered, removed, covered or obliterated shall be guilty of a felony.

(3) Any violation of the provisions of this act [this section] shall be punishable by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment of not more than five (5) years in the state penitentiary or both. [I.C., § 18-2410, as added by 1982, ch. 214, § 1, p. 588.]

Compiler's notes. Former § 18-2410 was repealed. See compiler's notes, § 18-2401.

Section 2 of S.L. 1982, ch. 214, declared an emergency. Approved March 29, 1982.

18-2411. Unlawful use of theft detection shielding devices. — (1) A person commits unlawful use of a theft detection shielding device when he knowingly manufacturers [manufactures], sells, offers for sale or distributes any laminated, or coated bag or device peculiar to shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.

(2) A person commits unlawful possession of a theft detection shielding device when he knowingly possesses any laminated or coated bag or device peculiar to and designed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor, with the intent to commit theft.

(3) A person commits unlawful possession of a theft detection device remover when he knowingly possesses any tool or device designed to allow the removal of any theft detection device from any merchandise without the permission of the merchant or person owning or holding the merchandise.

(4) A person commits the offense of unlawful removal of a theft detection device when he intentionally removes the device from a product prior to purchase.

(5) A person who commits unlawful use of a theft detection shielding device, unlawful possession of a theft detection shielding device, unlawful possession of a theft detection device remover or unlawful removal of a theft detection device shall be guilty of a misdemeanor for a first offense of a violation of the provisions of this section. Any person who pleads guilty to or is found guilty of a violation of the provisions of this section, or any substantially conforming statute in another state or local jurisdiction for a second time within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony and shall be punished by a fine not to exceed one thousand dollars (\$1,000) or shall be sentenced to the custody of the state board of correction for a term not to exceed five (5) years or both. [I.C., § 18-2411, as added by 2000, ch. 129, § 1, p. 304.]

Compiler's notes. Former § 18-2411, which comprised I.C., § 18-2411, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 183, § 1.

The bracketed word "manufactures" in subsection (1) was inserted by the compiler.

18-2412, 18-2413. Embezzlement, defense, mitigating circumstances, punishment. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-2412 and 18-2413, as added by 1972, ch. 336, § 1, p. 844 were repealed by S.L. 1981, ch. 183, § 1.

18-2415. Scanning — Reencoding. — (1) As used in this section, the term:

(a) "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.

(b) "Reencoder" means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different payment card.

(c) "Financial transaction card" or "FTC" means any instrument or device known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, telephone credit card or by any other name issued by the issuer for the use of the card holder in obtaining money, goods, services, or anything else of value on credit, or in certifying or guaranteeing to a person or business the availability to the card holder of the funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such a person or business; or any instrument or device used in providing the card holder access to a demand deposit account or a time deposit account for the purpose of making deposits of money or checks therein, or withdrawing funds in the form of money, money orders, or traveler's checks or other representative of value therefrom or transferring funds from any demand account or time deposit account to any credit card account in full or partial satisfaction of any outstanding balance existing therein.

(d) "Merchant" is defined as an owner or operator of any retail mercantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee, or independent contractor of such owner or operator. A "merchant" means a person who receives from an authorized user of a payment card, or someone the person believes to be an authorized user, a payment card or information from a payment card, or what the person believes to be a payment card or information from a payment card, as the instrument for obtaining, purchasing or receiving goods, services, money or anything else of value from the person.

(2) It is a felony for a person to use or possess with intent to use:

(a) A scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

(b) A reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card without the permission of the authorized user of the card from which the information is being reencoded and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

(3) Any person who commits a violation pursuant to this section shall be punished pursuant to the provisions of section 18-2408(2)(a), Idaho Code. [I.C., § 18-2415, as added by 2002, ch. 289, § 2, p. 837.]

Compiler's notes. Section 1 of S.L. 2002, ch. 289 is compiled as § 18-2408.

18-2416. Short title. — This act may be known and cited as the "Unused Merchandise Ownership Protection Act." [I.C., § 18-2416, as added by 2000, ch. 130, § 1, p. 305.]

Compiler's notes. "This act," referred to in this section, means S.L. 2000, ch. 130, which is codified as §§ 18-2416 to 18-2421.

18-2417. Definitions. — As used in the unused merchandise ownership protection act:

(1) "Open market" may include a "swap meet," an "indoor swap meet" or a "flea market" and means an event at which two (2) or more persons offer personal property for sale or exchange and either:

(a) A fee is charged for those persons selling or exchanging personal property or a fee is charged to the public for admission to the event; or

(b) The event is held more than two (2) times in a twelve (12) month period;

(2) "Unused merchandise" means tangible personal property that, since its original production or manufacturing, has never been used or consumed and, if placed in a package or container, is still in its original and unopened package or container; and

(3) "Vendor of unused merchandise" means a person who offers unused merchandise for sale or exchange at an open market. [I.C., § 18-2417, as added by 2000, ch. 130, § 1, p. 305.]

18-2418. Prohibited sales — Certain merchandise. — (1) It is a violation of the unused merchandise ownership protection act for a vendor of unused merchandise to sell or offer for sale any baby food or infant formula, cosmetic, drug or medical device at an open market without displaying a written valid authorization from the manufacturer or distributor of the merchandise. The authorization shall identify the vendor of unused merchandise and shall specify the merchandise that the vendor is authorized to sell.

(2) As used in this section:

(a) "Baby food or infant formula" means unused merchandise consisting of a food product manufactured, packaged and labeled specifically for consumption by a child less than two (2) years of age;

- (b) “Cosmetic” means unused merchandise, other than soap, that is:
 - (i) Intended to be rubbed, poured, sprinkled or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance; or
 - (ii) Intended for use as a component of any articles enumerated in subparagraph (i) of this paragraph;
- (c) “Drug” means unused merchandise, other than food, that:
 - (i) Is recognized in an official compendium;
 - (ii) Affects the structure or any function of the body of man or other animals; or
 - (iii) Is intended for use as a component of subparagraph (i) or (ii) of this paragraph, but does not include medical devices or their component parts or accessories;
- (d) “Medical device” means unused merchandise that is an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article, including any component, part or accessory, and that is:
 - (i) Recognized in an official compendium;
 - (ii) Intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment or prevention of disease, in man or other animals; or
 - (iii) Intended to affect the structure or function of the body of man or other animals and which does not achieve its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for achievement of its principal intended purposes; and
- (e) “Official compendium” means the official United States pharmacopoeia national formulary or the official homeopathic pharmacopoeia of the United States or any supplement to either of them. [I.C., § 18-2418, as added by 2000, ch. 130, § 1, p. 305.]

18-2419. Recordkeeping requirements — Violations. — (1) A vendor of unused merchandise shall maintain receipts for the vendor’s purchase of any unused merchandise sold or offered for sale by the vendor at an open market. The receipts shall be kept at the open market in which the unused merchandise is offered for sale and at the vendor’s residence or principal place of business for two (2) years after the merchandise is sold. Each receipt shall specify:

- (a) The date of the purchase;
 - (b) The name and address of the person from whom the unused merchandise was acquired;
 - (c) A description of the unused merchandise purchased, including any specific lot numbers or other identifying characteristics;
 - (d) The amount paid for the unused merchandise; and
 - (e) The signature of the buyer and the seller of the unused merchandise.
- (2) It is a violation of the unused merchandise ownership protection act for a person to knowingly:

- (a) Falsify, obliterate or destroy any receipt required to be kept pursuant to this section;
- (b) At the request of a police officer, fail or refuse to produce any receipt required to be kept pursuant to this section; and
- (c) Fail to maintain any receipt as required by this section. [I.C., § 18-2419, as added by 2000, ch. 130, § 1, p. 305.]

18-2420. Exemptions. — (1) The following persons are exempt from the provisions of the unused merchandise ownership protection act:

- (a) A vendor at an event organized or operated for religious, educational, charitable or other nonprofit purposes if no part of any admission fee or parking fee charged vendors or prospective purchasers and no part of the gross receipts or net earnings from the sale of merchandise at the event is paid to a private person for participating in the organization or operation of the event;
- (b) A vendor at an industry or association trade show;
- (c) A vendor at an event at which all of the merchandise offered for sale is new and at which all vendors are manufacturers or authorized representatives of manufacturers or distributors; and
- (d) A vendor selling by sample, catalog or brochure for future delivery.

(2) The requirements of the unused merchandise ownership protection act do not apply to sales or offers for sale of the following unused merchandise:

- (a) Firewood, sand, gravel, flagstone, building stone or other natural product;
- (b) Live animals;
- (c) Vehicles subject to registration pursuant to title 49, Idaho Code;
- (d) Food intended for human consumption at the open market immediately after sale;
- (e) Merchandise offered for sale as an antique or otherwise historical item and, although never used, the style, packaging, material or appearance of which clearly indicates that the merchandise was not produced or manufactured within recent times;
- (f) Food offered for sale that was grown, harvested or produced by the vendor or the vendor's principal; and
- (g) Art, crafts or handicrafts that were produced by the vendor or the vendor's principal. [I.C., § 18-2420, as added by 2000, ch. 130, § 1, p. 305.]

18-2421. Penalties. — A person who violates any provision of the unused merchandise ownership protection act is guilty of a misdemeanor for the first offense. Any person who pleads guilty to or is found guilty of a violation of the unused merchandise ownership protection act, or any substantially conforming statute in another state or any local jurisdiction, for a second time within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), is guilty of a felony and shall be sentenced to the custody of the state board of correction for a term not to exceed five (5) years, or shall be fined an amount not to exceed twenty-five

thousand dollars (\$25,000) or both. [I.C., § 18-2421, as added by 2000, ch. 130, § 1, p. 305.]

CHAPTER 25

ESCAPE OR RESCUE OF PRISONERS

SECTION.

- 18-2501. Rescuing prisoners.
- 18-2502. Officers assisting in escape.
- 18-2503. Carrying prisoner things to aid escape.
- 18-2504. Private persons assisting in escape.
- 18-2505. Escape by one charged with, convicted of, or on probation for a felony — Escape by a juvenile from custody.
- 18-2506. Escape by one charged with or convicted of a misdemeanor — Escape by a juvenile from custody.

SECTION.

- 18-2507. Expense of prosecution — How paid.
- 18-2508. Inmates of public institutions — Enticing, aiding to escape, harboring or employing unlawful.
- 18-2509. Punishment for violation of preceding section.
- 18-2510. Illicit conveyance of articles into correctional facilities.
- 18-2511. Possession of a controlled substance or dangerous weapon.

18-2501. Rescuing prisoners. — Every person who rescues, or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable with death, by imprisonment in the state prison not less than one (1) or more than fourteen (14) years.

2. If such prisoner was in custody upon a conviction of any other felony, by imprisonment in the state prison not less than six (6) months nor more than five (5) years.

3. If such prisoner was in custody upon a charge of felony, by a fine not exceeding \$1,000 and imprisonment in the county jail not exceeding one (1) year.

4. If such prisoner was in custody, otherwise than upon a charge or conviction of felony, by fine not exceeding \$500.00 and imprisonment in the county jail not exceeding six (6) months. [I.C., § 18-2501, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 101, 102; R.S., R.C., & C.L., § 6446; C.S., § 8146; I.C.A., § 17-801 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Rescues as contempts, § 7-601.

Escapes, unlawful conveyance of articles into and out of county jail, misdemeanor, § 20-627.

Sec. to sec. ref. This section is referred to in §§ 18-310 and 19-2520.

Collateral References. 27A Am. Jur. 2d, Escape, Prison Breaking and Rescue, § 1 et seq.

30A C.J.S., Escapes and Related Offenses — Rescue, § 1 et seq.

Escape or prison breach as affected by means employed to effect it. 10 A.L.R. 148; 50 A.L.R. 989; 96 A.L.R.2d 520.

Homicide, responsibility of persons participating in jail delivery for homicide committed by one of their number. 15 A.L.R. 456.

What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430; 69 A.L.R.3d 678.

Liability of clerk of court, county clerk, or prothonotary, or surety on bond, for negligent

or wrongful acts of deputies or assistants. 71 A.L.R.2d 1140.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Temporary unauthorized absence of prisoner as escape or attempted escape. 76 A.L.R.3d 695.

18-2502. Officers assisting in escape. — Any sheriff, deputy sheriff, peace officer, correctional officer or other employee of a correctional facility, as defined in section 18-101A, Idaho Code, including a private correctional facility, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in the state prison not exceeding ten (10) years, and [a] fine not exceeding ten thousand dollars (\$10,000). Every such officer or person who negligently suffers such escape is guilty of a misdemeanor. [I.C., § 18-2502, as added by 1972, ch. 336, § 1, p. 844; am. 2000, ch. 272, § 5, p. 786.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 103, 107; R.S., R.C., & C.L., § 6455; C.S., § 8151; I.C.A., § 17-805 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The bracketed word "a" was inserted by the compiler.

Sections 4 and 6 of S.L. 2000, ch. 272 are compiled as §§ 18-915A and 18-2505, respectively.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

Cross ref. Prisoner must be actually confined, § 20-614.

Punishment of misdemeanor not otherwise provided, § 18-113.

In General.

Sheriff who permits prisoner confined in jail to go at large without legal order or process is guilty of a felony. *Cornell v. Mason*, 46 Idaho 112, 268 P. 8 (1928).

Collateral References. Peace officer's liability for acts of assistant or deputy in permitting escape. 102 A.L.R. 185; 116 A.L.R. 1064.

Liability of clerk of court, county clerk or prothonotary, or surety or bond, for negligent or wrongful acts of deputies or assistants. 71 A.L.R.2d 1140.

Liability of public officer or body for harm done by prisoner permitted to escape. 44 A.L.R.3d 899.

18-2503. Carrying prisoner things to aid escape. — Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is guilty of a felony. [I.C., § 18-2503, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 104; R.S., R.C., & C.L., § 6457; C.S., § 8153; I.C.A., § 17-807 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Cited in: *State v. Carpenter*, 67 Idaho 277, 176 P.2d 919 (1947).

18-2504. Private persons assisting in escape. — Every person who wilfully assists any prisoner confined in any prison, or in the lawful custody of any officer or person, to escape, or in an attempt to escape, from such prison or custody, is guilty of a felony. [I.C., § 18-2504, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 106; R.S., R.C., & C.L., § 6456; C.S., § 8152; I.C.A., § 17-806 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

ANALYSIS

Aiding after escape.
Juvenile delinquents.

Aiding After Escape.

One aiding prisoner after he has left the

visual presence of his custodian, by giving him money, is guilty of assisting in escape. *State v. Jones*, 54 Idaho 782, 36 P.2d 530 (1934).

Juvenile Delinquents.

This section is not applicable to one charged with assisting a juvenile delinquent to escape from custody under juvenile delinquent law. *In re Small*, 19 Idaho 1, 116 P. 118 (1910).

Collateral References. Conspiring to commit offense of aiding prisoner to escape. 5 A.L.R. 789; 74 A.L.R. 1110; 131 A.L.R. 1322.

18-2505. Escape by one charged with, convicted of, or on probation for a felony — Escape by a juvenile from custody. — (1) Every prisoner charged with, convicted of, or on probation for a felony who is confined in any correctional facility, as defined in section 18-101A, Idaho Code, including any private correctional facility, or who while outside the walls of such correctional facility in the proper custody of any officer or person, or while in any factory, farm or other place without the walls of such correctional facility, who escapes or attempts to escape from such officer or person, or from such correctional facility, or from such factory, farm or other place without the walls of such correctional facility, shall be guilty of a felony, and upon conviction thereof, any such second term of imprisonment shall commence at the time he would otherwise have been discharged. Escape shall be deemed to include abandonment of a job site or work assignment without the permission of an employment supervisor or officer.

(2) Any person who is charged with, found to have committed, adjudicated for or is on probation for an offense which would be a felony if committed by an adult, and who is confined in a juvenile detention facility or other secure or nonsecure facility for juveniles and who escapes or attempts to escape from the facility or from the lawful custody of any officer or person shall be subject to proceedings under chapter 5, title 20, Idaho Code, for an offense which would be a felony if committed by an adult. If the juvenile is or has been proceeded against as an adult, pursuant to section 20-508 or 20-509, Idaho Code, the person shall be guilty of a felony for a violation of this section and shall be subject to adult criminal proceedings. [I.C., § 18-2505, as added by 1972, ch. 336, § 1, p. 844; am. 1990, ch. 313, § 1, p. 858; am. 1995, ch. 74, § 1, p. 194; am. 1997, ch. 77, § 1, p. 161; am. 1998, ch. 359, § 1, p. 1123; am. 2000, ch. 106, § 1, p. 234; am. 2000, ch. 151, § 1, p. 387; am. 2000, ch. 272, § 6, p. 786; am. 2004, ch. 50, § 1, p. 236.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 21, p. 46; S.L. 1911, ch. 61, § 1, p. 171; compiled and reen. C.L., § 6452; C.S., § 8148; S.L. 1931, ch. 127, § 1, p. 223; I.C.A., § 17-803; S.L. 1969, ch. 205, § 1, p. 600 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

This section was amended by three 2000 acts — ch. 106, § 1, ch. 151, § 1, both effective July 1, 2000 and ch. 272, § 6, effective April 12, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 106, § 1, near

the beginning of subsection (2), substituted "who is" for "under the age of eighteen (18)", inserted "adjudicated for" following "to have committed", inserted "is" preceding "who is confined", and near the end of the subsection, substituted "person" for "juvenile".

The 2000 amendment by ch. 151, § 1, in subsection (1), added the last sentence; and in subsection (2), inserted "years" following "eighteen (18)".

The 2000 amendment by ch. 272, § 6, in subsection (1), substituted "correctional facility, as defined in section 18-101A, Idaho Code, including any private correctional facility" for "jail or prison including the state penitentiary or any private prison", and substituted "correctional facility" for "jail or prison" in four places; and in subsection (2), inserted "years" following "eighteen (18)".

Sections 5 and 7 of S.L. 2000, ch. 272 are compiled as §§ 18-2502 and 18-2507, respectively.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

Section 2 of S.L. 2004, ch. 50 is compiled as § 20-504.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-2507, 19-2520, 20-101C and 20-242.

Cited in: *State v. Salazar*, 95 Idaho 650, 516 P.2d 707 (1973); *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977); *Lake v. State*, 124 Idaho 259, 858 P.2d 798 (Ct. App. 1993); *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000).

ANALYSIS

Appellate remedies.

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Appellate Remedies.

Having failed to appeal to this court his conviction and life sentence for robbery and five-year term for escape from jail, though given an adequate opportunity to do so, peti-

tioner could not subsequently employ habeas corpus as an appellate remedy. *Mahaffey v. State*, 87 Idaho 233, 392 P.2d 423 (1964).

There could be no question but that the sentencing judge had jurisdiction to impose the particular sentences in this case, or that the statutes clearly grant him the power to issue life sentences for robbery and five-year terms for escape from jail; moreover, petitioner had an opportunity to appeal to the Supreme Court and, having failed to do so, can not now employ habeas corpus as an appellate remedy. *Mahaffey v. State*, 87 Idaho 233, 392 P.2d 423 (1964).

Application.

This section applies not only to persons incarcerated on Idaho charges but also to those who may be incarcerated in Idaho pursuant to felony charges or convictions issued in another jurisdiction. *State v. Swisher*, 125 Idaho 797, 874 P.2d 608 (Ct. App. 1994).

Trial court correctly dismissed a charge of escape where defendant was not "outside the walls of such correctional facility," because, although he had been charged with a felony, he had not yet been placed in a correctional facility when he emerged from the patrol car and fled. *State v. Shanks*, — Idaho —, 75 P.3d 206 (Ct. App. 2003).

Constitutionality.

Punishment of escapee for a felony if confined on charge or conviction of a felony, and punishment of escapee for a misdemeanor if confined on charge or conviction of a misdemeanor does not constitute an unreasonable or arbitrary classification, hence escape statutes are not unconstitutional on the ground that punishment constitutes a denial of equal protection of the law. *Ex parte Knapp*, 73 Idaho 505, 254 P.2d 411 (1953).

The former section was not unconstitutional because of discrimination between life prisoners and those sentenced for less than life (this distinction was abolished by amendment of the former section). *Mallory v. State*, 91 Idaho 914, 435 P.2d 254 (1967).

There is no constitutional violation in allowing the state department of corrections, a department of the executive branch, to insert an escape sentence between the fixed and indeterminate portions of another sentence imposed by the judiciary. *Doan v. State*, 132 Idaho 796, 979 P.2d 1154 (1999).

In General.

An arrest of an alleged escapee by Oregon police pursuant to information from Idaho police that he was wanted as an escapee on a felony charge without information that the Idaho police held a warrant for his arrest was invalid. *State v. Roderick*, 243 Idaho 105, 412 P.2d 17 (1966).

Intent.

Intent to evade the due course of justice is not an essential element of the crime of escape. *State v. Marks*, 92 Idaho 368, 442 P.2d 778 (1968).

Invalidity of Conviction.

Invalidity of the conviction of an inmate of the penitentiary was not a defense to prosecution for escape. *State v. Handran*, 92 Idaho 579, 448 P.2d 193 (1968).

Legislative Intent.

The legislative purpose underlying this section is to preserve the integrity of Idaho's jails and penal institutions, to deter escapes by those who are lawfully confined in Idaho correctional facilities and to prevent harm to the public that may be effected by such persons while at large. That purpose applies no less to those charged with or convicted of felonies in foreign jurisdictions than to detainees held for commission of felonies in Idaho. *State v. Swisher*, 125 Idaho 797, 874 P.2d 608 (Ct. App. 1994).

Misdemeanor Escape.

The former section had no application where, prior to his escape, appellant was neither convicted of, nor charged with, a felony. *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969).

Necessity Defense.

In order to establish the necessity defense with regard to a prosecution for escape, defendant had to show (1) the threat of death or danger of serious imminent harm; (2) the futility of reporting the threat or danger to custodial authorities; (3) avoidance of violence during the escape; and (4) intent to contact another law enforcement agency immediately following the escape. *State v. Mills*, 117 Idaho 534, 789 P.2d 530 (Ct. App. 1990).

The district court did not abuse its discretion in concluding that defendant did not present sufficient evidence to satisfy all elements of the necessity defense where: (1) defendant failed to notify authorities of threats from other inmates; (2) he never received any medical treatment or sought protection for alleged beatings; (3) there was no evidence of his intent to contact law enforcement after escape; and (4) he presented no evidence of intent to turn himself in. *State v. Bowers*, 131 Idaho 639, 962 P.2d 1023 (1998).

Proving Felony Charge.

Where defendants were on trial for crime of "escape by one charged with felony," warrants showing that they were charged with robbery at the time of their escape was admissible to prove an essential element of the state's case and hence the admission, not remitting in prejudice, was a harmless error. *State v. Moen*, 94 Idaho 477, 491 P.2d 858 (1971).

Sentence.

Since consecutive sentencing is mandatory for a defendant convicted of an escape punishable under this section, the trial court properly sentenced a defendant, who had escaped while awaiting a trial for assault with a deadly weapon, to a four-year sentence running consecutively after two other consecutive four-year sentences based on two convictions for assault with a deadly weapon. *State v. Thomas*, 98 Idaho 623, 570 P.2d 860 (1977).

Two and one-half year, indeterminate sentences were within the maximum penalty authorized by statute for attempted escape and were not excessive as the term of additional confinement did not exceed the minimum period necessary to serve society's interest in deterring escapes. *State v. Urquhart*, 105 Idaho 92, 665 P.2d 1102 (Ct. App. 1983).

An escape sentence may, if it specifically so provides, commence when the defendant otherwise would be discharged on the other felony, even if a sentence for that felony has not yet been pronounced since, so long as the other felony is adequately identified, custodial authorities can ascertain when the defendant would be entitled to discharge from custody on that felony and the escape sentence can be administered accordingly; if the escape sentence does not contain such a provision, the same result still might be obtained indirectly by making the sentence for the other felony consecutive to the escape sentence and, in that event the two sentences, taken together would satisfy the mandate of this section. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

This section leaves no room for discretion in deciding when the consecutive sentence for escape will begin; it must begin when the escapee "otherwise would have been discharged." It does not allow for a time interval between discharge of the sentence(s) being served when the escape occurred and commencement of the escape sentence; thus, the trial court erred in making the escape sentence consecutive to a sentence imposed in another state for a crime committed after the prisoner had escaped. *State v. McKaughen*, 108 Idaho 471, 700 P.2d 93 (Ct. App. 1985).

Where the defendant's presentence report indicated that the defendant was too sophisticated a criminal to be adequately monitored by law enforcement or parole services and was too significant a risk to remain at large in the public, the consecutive sentences of 20 years for escape, two years for injury to jail property, 90 days for assault and ten years for robbery were not an abuse of discretion. *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

The district court did not abuse its discretion in sentencing the defendant to a five-year indeterminate sentence for escape and a ten-

year indeterminate sentence for burglary, where the record showed the judge's concern that society be protected from the defendant's criminal activities, and consideration was given to the related objectives of deterrence, rehabilitation and retribution. *State v. Briggs*, 113 Idaho 71, 741 P.2d 358 (Ct. App. 1987).

A unified sentence of 13 years in the custody of the Board of Corrections with a three year minimum period of confinement was not excessive for a conviction of felony escape with persistent violator enhancement, even though defendant had not been convicted of a violent crime and the county sheriff had testified as to improvement in defendant's conduct while in custody. *State v. Holton*, 120 Idaho 112, 813 P.2d 923 (Ct. App. 1991).

—Commutation of Sentencing.

The authority to commute a sentence imposed by the district court is vested in the Commission of Pardons and Parole and defendant's argument that commission's action in commuting his escape sentence to run concurrently with his underlying sentence violated this section fails because Const. art. 4, § 7 which existed at the time of the commission's action in this case, did not place a limitation upon the commission's commutation power through reference to statutory mandates. *State v. Beason*, 119 Idaho 103, 803 P.2d 1009 (Ct. App. 1991).

—Consecutive Sentences Mandatory.

If a person escapes from custody while charged with or convicted of a felony, any sentence of confinement for the escape must be consecutive to the confinement imposed for the underlying felony. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

Any confinement under an escape sentence, and any confinement upon the felony for which the defendant was in custody when he escaped, must be consecutive and it does not matter, in light of this overriding principle, which of the two sentences is pronounced first. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

Terms of imprisonment for grand larceny and for escape prior to sentencing for the larceny were required to be consecutive and original escape sentence was defective for failure to so provide, which defect was not remedied indirectly by any consecutive confinement provision in the grand larceny sentence; therefore, it was appropriate for the district judge, upon revoking defendant's probation, to consider modifying the sentences to bring them into conformity with the mandate of this section. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

The phrase "second term of imprisonment" means that the escape sentence and the sentence(s) being served when the escape oc-

curred must be consecutive. *State v. McKaughen*, 108 Idaho 471, 700 P.2d 93 (Ct. App. 1985).

Consecutive sentences for felony escape are mandatory. *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987).

This statute requires that a sentence for escape be consecutive to a sentence for the felony during which the escape occurred. *Doan v. State*, 132 Idaho 796, 979 P.2d 1154 (1999).

—Excessive.

Although defendant's sentence for possession of methamphetamine was reasonable, his fixed five-year sentence for escape was excessive where the circumstances of defendant's escape were not aggravated or egregious. *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000).

—Limits.

The principle of § 19-2603 that sentence may not be increased when probation is revoked limits but does not displace — and is not displaced by — the principle of consecutive imprisonment for escape established by this section and the principles are not mutually exclusive; the court may impose consecutive terms in cases outside the scope of § 19-2603 and may correct an illegal, concurrent sentence by making it consecutive, in a § 19-2603 case, but the range of corrective sentences is narrowed to those which will not increase the aggregate penalty imposed. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

Where defendant was incorrectly sentenced to two five-year concurrent, rather than consecutive, sentences for larceny and escape and trial judge who revoked defendant's probation then imposed two five-year consecutive sentences, the trial judge exceeded his authority by imposing an aggregate penalty exceeding that in the original sentences. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

—Not Excessive.

A five-year fixed sentence for escape and a 15-year indeterminate sentence for burglary, to be served concurrently with each other but consecutively to the existing rape sentence, were not excessive, where the defendant was 23 when he committed the offenses, and he was an intelligent adult fully responsible for his actions. *State v. Maddock*, 113 Idaho 182, 742 P.2d 437 (Ct. App. 1987).

Where the defendant entered guilty pleas to three counts of grand theft, one count of second degree burglary, two counts of petty theft, and one count of escape from a county jail and received a series of indeterminate sentences, some concurrent and some consecutive, aggregating a total of 15 years, his

sentences were not excessive, even though he portrayed his part in the criminal proceedings after the escape as that of an unwilling participant, where the sentences were well within the maximum penalties which the judge could have imposed, the judge took into consideration the defendant's character, including the testimony of witnesses who spoke in his behalf, judge considered the seriousness of the crimes, and the impact lesser sentences would have on the defendant and society, and the judge reasoned that although the defendant may have been coerced into escaping, he undertook the escape under his own free will, and could have departed from his fellow escapees several times during their flight. *State v. Chacon*, 114 Idaho 789, 760 P.2d 1205 (Ct. App. 1988).

Trial court did not err in fixing the defendant's sentence for escape as consecutive with a sentence for lewd conduct where the defendant was in jail for the lewd conduct charge and also for breaking parole at the time of the escape, as the sentence for lewd conduct had already been set when the defendant escaped, and the earliest the defendant would be discharged was after the lewd conduct sentence had run rather than the reimposed sentence for the parole violation, even though the sentence for parole violation was shorter. *State v. Dewey*, 131 Idaho 846, 965 P.2d 206 (Ct. App. 1998).

Trial for Escape.

Prisoner who escapes while serving a term in the state prison may, before expiration of his term, be tried for such escape and the trial of defendant on the charge of such escape in no way interferes with judgment of conviction under which he is imprisoned. *Hays v. Stewart*, 7 Idaho 193, 61 P. 591 (1900).

In a prosecution of an alleged recidivist where the prior felony convictions relied upon were committed in another state, the prosecution is required to establish the jurisdiction of the court in the prior conviction, both of the accused and subject matter. *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942).

Voluntariness of Guilty Plea.

Where a man, 64, was in prison on a seven-year sentence for armed robbery, and hit a

guard with a metal bottle during an escape, and was charged with violation of this section, and pleaded guilty to a violation of this section, and was present with his attorney prior to actual imposition of sentence, at which time his attorney asked that defendant's sentence not be made consecutive due to his advanced age and ill health, and the prosecutor said he was not requesting a consecutive sentence, the defendant would not be heard to assert that his guilty plea was involuntary because he was unaware of the possibility of a consecutive sentence. *State v. Flummer*, 99 Idaho 567, 585 P.2d 1278 (1978).

Work-Release Probation.

Evidence was insufficient to support conviction for escape where defendant, who had received suspended sentence and had been placed on work-release probation, was confined in jail only at night under the work-release program and was released during the day; his failure to return to jail was a breach of the terms of his probation but was not an "escape" from custody since he had not been sentenced. *State v. Rocque*, 104 Idaho 445, 660 P.2d 57 (1983).

Collateral References. Entry and search of premises for purpose of rearrest of escaped prisoner without warrant. 5 A.L.R. 273.

Recital of, or reference to, the offense on pronouncing sentence or judgment for escape or aiding escape. 14 A.L.R. 998.

Extradition of escaped convict. 78 A.L.R. 420.

What justifies escape or attempt to escape or assistance in that regard. 70 A.L.R.2d 1430; 69 A.L.R.3d 678.

Escape or prison breach affected by means employed. 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 78.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape. 76 A.L.R.3d 658.

Temporary unauthorized absence of prisoner as escape or attempted escape. 76 A.L.R.3d 695.

Loss of jurisdiction by delay in imposing sentence. 98 A.L.R.3d 605.

18-2506. Escape by one charged with or convicted of a misdemeanor — Escape by a juvenile from custody. —

(1)(a) Every prisoner charged with or convicted of a misdemeanor who is confined in any county jail or other place or who is engaged in any county work outside of such jail or other place, or who is in the lawful custody of any officer or person, who escapes or attempts to escape therefrom, is guilty of a misdemeanor.

(b) In cases involving escape or attempted escape by use of threat, intimidation, force, violence, injury to person or property other than that

of the prisoner, or wherein the escape or attempted escape was perpetrated by use or possession of any weapon, tool, instrument or other substance, the prisoner shall be guilty of a felony.

(2) Any person who is charged with, found to have committed, adjudicated for or is on probation for an offense which would be a misdemeanor if committed by an adult, and who is confined in a juvenile detention facility or other secure or nonsecure facility for juveniles and who escapes or attempts to escape from the facility or from the lawful custody of an officer or person, shall be subject to proceedings under the provisions of chapter 5, title 20, Idaho Code, for an act which would be a misdemeanor if committed by an adult, or, if the escape or attempted escape was undertaken as provided in subsection (1) (b) of this section, for an offense which would be a felony if committed by an adult. If the juvenile is or has been proceeded against as an adult, pursuant to section 20-508 or 20-509, Idaho Code, the person shall be guilty of a misdemeanor, or if subsection (1) (b) of this section applies, of a felony and, in either case, shall be subject to adult criminal proceedings. [I.C., § 18-2506, as added by 1972, ch. 336, § 1, p. 844; am. 1995, ch. 74, § 2, p. 194; am. 1997, ch. 77, § 2, p. 161; am. 2000, ch. 106, § 2, p. 234.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6454; C.S., § 8150; S.L. 1931, ch. 127, § 2, p. 223; I.C.A., § 17-804; S.L. 1963, ch. 287, § 1, p. 754 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 19-2520.

Cited in: *State v. Yancey*, 47 Idaho 1, 272 P. 495 (1928); *State v. Machen*, 100 Idaho 167, 595 P.2d 316 (1979).

ANALYSIS

Consecutive terms.

Constitutionality.

Construction.

Convicted of misdemeanor necessary.

In general.

Necessity defense.

Consecutive Terms.

Escape, even under circumstances where such escape is a felony, did not in and of itself require a sentence to run consecutively with that which was being served, nor did the former section prohibit such consecutive sentencing. *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969).

Constitutionality.

Punishment of escapee for a felony if confined on charge or conviction of a felony, and punishment of escapee for a misdemeanor if confined on charge or conviction of a misde-

meanor does not constitute an unreasonable or arbitrary classification; hence escape statutes are not unconstitutional on the ground that punishment constitutes a denial of equal protection of the law. *Ex parte Knapp*, 73 Idaho 505, 254 P.2d 411 (1953).

Construction.

The trial court erred by instructing the jury that having been charged and having been in lawful custody were alternative elements of this section. *State v. Nab*, 112 Idaho 1139, 739 P.2d 438 (Ct. App. 1987).

The meaning of this section is clear: the prisoner must be (1) charged with or convicted of a misdemeanor, and (2) either confined in any county jail or other place or engaged in any county work outside of such jail or other place or in lawful custody of any officer or person. *State v. Nab*, 112 Idaho 1139, 739 P.2d 438 (Ct. App. 1987).

Convicted of Misdemeanor Necessary.

Because the state conceded that the defendant had not been charged with a misdemeanor prior to his flight, the defendant's motion to dismiss should have been granted. *State v. Nab*, 112 Idaho 1139, 739 P.2d 438 (Ct. App. 1987).

In General.

In accepting a plea of guilty, the court should explain to the defendant the distinction between a misdemeanor and felony and the better procedure would be to take evidence at a recorded hearing regarding the circumstances of the alleged offense. *Bement v. State*, 91 Idaho 388, 422 P.2d 55 (1966).

Necessity Defense.

In order to establish the necessity defense with regard to a prosecution for escape, defendant had to show (1) the threat of death or danger of serious imminent harm; (2) the futility of reporting the threat or danger to

custodial authorities; (3) avoidance of violence during the escape; and (4) intent to contact another law enforcement agency immediately following the escape. *State v. Mills*, 117 Idaho 534, 789 P.2d 530 (Ct. App. 1990).

18-2507. Expense of prosecution — How paid. — Whenever a person is prosecuted under any of the provisions of section 18-2505, Idaho Code, and whenever a prisoner in the custody of the board of correction housed in a state correctional facility, as defined in section 18-101A, Idaho Code, shall be prosecuted for any crime committed therein, the clerk of the district court shall make out a statement of all the costs incurred by the county for the prosecution of such case, and for the guarding and keeping of such prisoner, and when certified by the judge who tried the case, such statement shall be audited by the board of examiners. If approved, the board of examiners shall submit the claim, with a request for an appropriation, to the legislature at its first session after the rendition of such claim. If the legislature appropriates funds for such claim, the amount shall be paid by the board of examiners to the treasurer of the county where the trial was had. The provisions of this section shall apply to prosecution of a prisoner in the custody of the board of correction and housed in a private correctional facility unless otherwise provided for in any contract between the state of Idaho and the private prison contractor entered into pursuant to chapter 2, title 20, Idaho Code.

Costs of prosecution of all other prisoners housed in a private correctional facility shall be recoverable from the private prison contractor, as provided in section 20-809, Idaho Code. [I.C., § 18-2507, as added by 1972, ch. 336, § 1, p. 844; am. 1984, ch. 79, § 1, p. 146; am. 1985, ch. 80, § 1, p. 155; am. 2000, ch. 272, § 7, p. 786; am. 2001, ch. 335, § 11, p. 1177.]

Compiler's notes. A former section, which comprised R.S., § 6458; reen. R.C. & C.L., § 6458; C.S., § 8154; I.C.A., § 17-808 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 1984, ch. 79 is compiled as § 31-2219.

Sections 6 and 8 of S.L. 2000, ch. 272 are compiled as §§ 18-2505 and 18-2510, respectively.

Sections 10 and 12 of S.L. 2001, ch. 335 are compiled as §§ 6-904B and 20-209, respectively.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

18-2508. Inmates of public institutions — Enticing, aiding to escape, harboring or employing unlawful. — It shall be unlawful for any person, firm, copartnership, corporation or association to knowingly entice, harbor, employ, or aid, assist or abet in the escape, enticing, harboring or employment of any delinquent, insane, feeble-minded or incorrigible person committed to, or confined in any institution maintained by the state for the treatment, education or welfare of delinquent or feeble-minded, incorrigible or insane person. [I.C., § 18-2508, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1931, ch. 73, § 1, p. 130;

I.C.A., § 17-809 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Escape from pub-

lic employee or institution other than correctional or law enforcement employee or institution as criminal offense. 69 A.L.R.3d 625.

18-2509. Punishment for violation of preceding section. — Any person violating the provisions of this act upon conviction, shall be punished by a fine of not less than \$25.00 nor more than \$300.00, or imprisonment in the county jail for not less than thirty (30) days nor more than ninety (90) days, or both. [I.C., § 18-2509, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1931, ch. 73, § 2, p. 130; I.C.A., § 17-810 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2510. Illicit conveyance of articles into correctional facilities. — (1) If any person delivers or procures to be delivered, or has in his possession with intent to be delivered in any manner, to a prisoner of any state correctional facility, or deposits or conceals in or about the facility or dependencies thereon, or upon any lands belonging or pertaining thereto, or in any vehicle going into the premises belonging to the said facility, any letter, article or thing with the intent that a prisoner confined in said facility shall obtain or receive the same, or if any person receives from any prisoner of said facility, any letter, article or thing with intent to convey the same out of the facility contrary to the rules thereof, and without the knowledge and permission of the warden of said facility, or if any person shall purchase, exchange, take or receive from any prisoner thereof while he may be working outside said facility, any letter, article or thing, whether state or other property, manufactured or used in and about said facility, without the knowledge and permission of the warden of said facility, such person shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding three hundred dollars (\$300), or imprisonment in the county jail for a period not exceeding six (6) months, or by both such fine and imprisonment.

(2) As used in this section, a correctional facility is a facility for housing persons committed or transferred to the custody of the board of correction, or a private correctional facility housing prisoners under the custody of the board of correction or housing out-of-state prisoners, as defined in section 18-101A, Idaho Code, but shall not include facilities operated by, or under the control of, other agencies of state, county or municipal government. [I.C., § 18-2510, as added by 1972, ch. 336, § 1, p. 844; am. 1985, ch. 78, § 1, p. 151; am. 2000, ch. 272, § 8, p. 786.]

Compiler's notes. A former section, which comprised S.L. 1907, p. 97, § 1; reen. R.C. & C.L., § 7220; C.S., § 8600; I.C.A., § 17-4611 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sections 7 and 9 of S.L. 2000, ch. 272 are compiled as §§ 18-2507 and 18-6110, respectively.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

Cross ref. Similar provisions concerning county jails, § 20-627.

Collateral References. Censorship of convicted prisoners' "legal mail." 47 A.L.R.3d 1150.

Censorship of convicted prisoners' "nonlegal" mail. 47 A.L.R.3d 1192.

18-2511. Possession of a controlled substance or dangerous weapon. — Any inmate of a penal institution or a jail who shall manufacture, deliver or possess a controlled substance or a dangerous weapon is guilty of a felony. [I.C., § 18-2511, as added by 1974, ch. 90, § 1, p. 1186; am. 1993, ch. 166, § 1, p. 423.]

Cross ref. Controlled substances act, § 37-2701 et seq.

Dangerous weapons enumerated, § 18-3302.

Cited in: State v. Carper, 116 Idaho 77, 773 P.2d 1164 (Ct. App. 1989).

Sentence as Deterrent.

Denial of defendant's motion to modify sen-

tence was not an abuse of discretion where sentence was for six months in the county jail, for misdemeanor possession of a controlled substance by an inmate, to be served consecutively with defendant's existing felony prison term; trial court concluded that defendant's sentence may serve as a deterrent to others. State v. Trent, 125 Idaho 251, 869 P.2d 568 (Ct. App. 1994).

CHAPTER 26

EVIDENCE FALSIFIED OR CONCEALED AND WITNESSES
INTIMIDATED OR BRIBED

SECTION.

- 18-2601. Falsifying evidence — Offering forged or fraudulent documents in evidence.
- 18-2602. Preparing false evidence.
- 18-2603. Destruction, alteration or concealment of evidence.

SECTION.

- 18-2604. Intimidating a witness.
- 18-2605. Bribing witnesses.
- 18-2606. Receiving of bribe by witness.

18-2601. Falsifying evidence — Offering forged or fraudulent documents in evidence. — Every person who, upon any trial, proceeding, inquiry or investigation whatever authorized or permitted by law, offers in evidence as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of felony. [I.C., § 18-2601, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6500; C.S., § 8172; I.C.A., § 17-918 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Tampering with public records, § 18-3201 et seq.

Collateral References. 67 C.J.S., Ob-

structing Justice or Governmental Administration, § 1 et seq.

Admissibility in prosecution for bribery or accepting bribes of evidence tending to show commission of other bribery or acceptance of bribe. 20 A.L.R.2d 1012.

Entrapment to commit bribery or offer to bribe. 69 A.L.R.2d 1397.

Fabrication or suppression of evidence as ground of disciplinary action against attorney. 40 A.L.R.3d 169.

18-2602. Preparing false evidence. — Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced,

for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding or inquiry whatever, authorized by law, is guilty of felony. [I.C., § 18-2602, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6501; C.S., § 8173; I.C.A., § 17-919 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-2603. Destruction, alteration or concealment of evidence. —

Every person who, knowing that any book, paper, record, instrument in writing, or other object, matter or thing, is about to be produced, used or discovered as evidence upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, wilfully destroys, alters or conceals the same, with intent thereby to prevent it from being produced, used or discovered, is guilty of a misdemeanor, unless the trial, proceeding, inquiry or investigation is criminal in nature and involves a felony offense, in which case said person is guilty of a felony and subject to a maximum fine of ten thousand dollars (\$10,000) and a maximum sentence of five (5) years in prison. [I.C., § 18-2603, as added by 1972, ch. 336, § 1, p. 844; 1983, ch. 250, § 1, p. 671; am. 1990, ch. 309, § 1, p. 849.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6502; C.S., § 8174; I.C.A., § 17-920 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: State v. Johnston, 62 Idaho 601, 113 P.2d 809 (1941).

ANALYSIS

Amendment.

Destruction after illegal search.

Elements.

Jury instructions.

Purpose.

Amendment.

Former § 18-2603 originally provided that the destruction of evidence was punishable only as a misdemeanor, then, in 1983, the legislature enacted an amendment to § 18-2603 to establish the destruction of evidence as a felony offense in certain cases. The statement of purpose for the 1983 amendment reflects the legislature's intent to make the classification of the destruction of evidence offense conform to the classification of the offense for which the defendant attempted to evade liability by way of that destruction, just as it had brought into conformity the offense classification for the crime of witness intimidation under § 18-2604 and the crime for

which the defendant attempted to evade liability by way of that intimidation. State v. Peteja, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

Destruction After Illegal Search.

Because the evidence had already been reduced to the sole custody of the police at the time defendant flushed the suspected contraband down the toilet, defendant's actions were her own and were independent of any police coercion caused by the illegal arrest and search for evidence; therefore, the intervening circumstance factor strongly militated against suppression of the evidence of the destruction and the subsequent dismissal of the destruction of evidence charge. State v. Schrecengost, 134 Idaho 547, 6 P.3d 403 (Ct. App. 2000).

Elements.

Parsing out the statute's text and linguistic meaning, the elements of this misdemeanor offense are as follows: (1) defendant knew that an object was about to be produced, used, or discovered as evidence in any legally authorized trial, proceeding, inquiry, or investigation; (2) defendant willfully destroyed, altered, or concealed that object; and (3) defendant in acting to destroy, alter, or conceal that object intended to prevent the object's production, use, or discovery. State v. Peteja, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

Jury Instructions.

Although the record disclosed sufficient evidence to support the jury's verdict of guilty

on a conspiracy count, vacation and remand for resentencing was required where the conspiracy charge contained in the indictment and in the instructions to the jury defined a misdemeanor offense and failed to include the statutory language which would elevate the crime to felony status. *State v. Nunez*, 133 Idaho 13, 981 P.2d 738 (1999).

Court of Appeals of Idaho gives proper effect to the legislature's intent by interpreting this section to mean that whether the investigation "involves a felony offense" depends upon on whether the evidence that was destroyed, altered, or concealed would have tended to demonstrate the commission of a felony. *State v. Peteja*, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

It was harmless error where, although a jury instruction incorrectly articulated the law applicable to the felony destruction of evidence because it failed to require the jury to find that the investigation was "criminal in nature" and "involved a felony offense," the evidence, undisputed and bolstered by defendant's testimony, established that the officer's investigation was a legally-authorized investigation and that, at the time of the destruction and concealment of the evidence, the investigation involved a felony — the possession of methamphetamine. Furthermore, the jury must have rejected defendant's testimony that he did not swallow anything or attempt to destroy evidence because, in finding him guilty under the flawed instruction, the jury necessarily found that he "destroyed and/or concealed a clear baggy with white powder." *State v. Peteja*, — Idaho —, 83 P.3d 781 (Ct. App. 2003). *

Idaho has neither a pattern jury instruction nor case law approving a jury instruction for a felony offense under this section. *State v.*

Peteja, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

Purpose.

Public policy underlying statutes criminalizing the destruction of evidence is to prevent the obstruction of justice, whether permanent obstruction by the destruction of evidence or temporary obstruction by the alteration or concealment of the evidence, thereby causing the impediment, frustration, or unnecessary prolongation of a lawful investigation. Prior to the 1983 amendment, an individual destroying evidence of a felony crime could incur only misdemeanor liability for that destruction. With its 1983 amendment, the Idaho legislature intended to close this loophole. *State v. Peteja*, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

Statement of purpose for the amendment to this section adopted language stating that a felony destruction of evidence offense should accrue if the evidence would tend to show a defendant had committed a felony. Although the legislature did not incorporate this "tendency to show" language into the statute itself, its inclusion of this language in the statement of purpose clarifies its intent as to the meaning of the statute's phrase, "involves a felony." It is evident the legislature did not intend to institute the restrictive limits whereby the classification of the destruction of evidence offense is fixed forever to the classification of the offense targeted by the investigation at its inception. *State v. Peteja*, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

Collateral References. Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 A.L.R.5th 61.

Effect of spoliation of evidence in products liability action. 102 A.L.R.5th 99.

18-2604. Intimidating a witness. — (1) Any person who, by direct or indirect force, or by any threats to a person or property, or by any manner wilfully intimidates, influences, impedes, deters, threatens, harasses, obstructs or prevents a witness, including a child witness, or any person who may be called as a witness or any person he believes may be called as a witness in any civil proceeding from testifying freely, fully and truthfully in that civil proceeding is guilty of a misdemeanor.

(2) Any person who, by direct or indirect force, or by any threats to a person or property, or by any manner wilfully intimidates, threatens or harasses any person because such person has testified or because he believes that such person has testified in any civil proceedings is guilty of a misdemeanor.

(3) Any person who, by direct or indirect force, or by any threats to person or property, or by any manner wilfully intimidates, influences, impedes, deters, threatens, harasses, obstructs or prevents, a witness, including a child witness, or any person who may be called as a witness or any person he believes may be called as a witness in any criminal proceeding or juvenile

evidentiary hearing from testifying freely, fully and truthfully in that criminal proceeding or juvenile evidentiary hearing is guilty of a felony.

(4) Any person who, by direct or indirect force, or by any threats to a person or property, or by any manner wilfully intimidates, threatens or harasses any person because such person has testified or because he believes that such person has testified in any criminal proceeding or juvenile evidentiary hearing is guilty of a felony.

(5) The fact that a person was not actually prevented from testifying shall not be a defense to a charge brought under subsection (1), (2), (3) or (4) of this section. [I.C., § 18-2604, as added by 1985, ch. 174, § 2, p. 456; am. 1993, ch. 46, § 1, p. 118; am. 1995, ch. 50, § 1, p. 117; am. 1996, ch. 272, § 18, p. 884.]

Compiler's notes. Former § 18-2604, which comprised I.C., § 18-2604, as added by 1972, ch. 336, § 1, p. 844; am. 1980, ch. 153, § 1, p. 323, was repealed by S.L. 1985, ch. 174, § 1.

Section 17 of S.L. 1996, ch. 272 is compiled as § 16-1632.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-310.

Cited in: *State v. Keller*, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985).

ANALYSIS

Belief of defendant.
Conspiracy.

Belief of Defendant.

This subsection permits the state to charge a person when there is evidence that he believes that the intimidated person has testified in a criminal proceeding. *State v. Baer*, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999).

Conspiracy.

For a case of conspiracy to secure absence of a witness, see *State v. Roe*, 19 Idaho 416, 113 P. 461 (1911).

Collateral References. Construction and application of federal witness tampering statute, 18 U.S.C.A. § 1512(b). 185 A.L.R. Fed. 1.

18-2605. Bribing witnesses. — Every person who gives or offers, or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false or to withhold true testimony, is guilty of a misdemeanor. [I.C., § 18-2605, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6504; C.S., § 8176; I.C.A., § 922 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. "Bribe" defined, § 18-101.

Incriminating testimony may be required in bribery case, § 18-1308.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. Construction and application of federal witness tampering statute, § 18 U.S.C.A. 1512(b). 185 A.L.R. Fed. 1.

18-2606. Receiving of bribe by witness. — Every person who is a witness, or is about to be called as such, who receives or offers to receive any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a misdemeanor. [I.C., § 18-2606, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., & C.L., § 6505; C.S., § 8177; I.C.A., § 17-923 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. New trial, statements after criminal trial tending to show bribery of witness as ground for. 33 A.L.R. 556; 74 A.L.R. 757; 158 A.L.R. 1062.

Falsity of contemplated testimony as condition of offense of bribery of, attempt to bribe, or acceptance of bribe or gift by, prospective witness. 110 A.L.R. 582.

CHAPTER 27

EXECUTIVE POWER

SECTION.

18-2701. Bribery of executive officers.
18-2702. Asking or receiving bribes.
18-2703. [Repealed.]
18-2704. Asking or receiving rewards.
18-2705. Officers not to purchase scrip.
18-2706. Presentation of fraudulent accounts.

SECTION.

18-2707. Buying appointments.
18-2708. Making appointments for reward.
18-2709. Intrusion into office — Holding over.
18-2710. Withholding books and records from successor.
18-2711. Application of chapter.
18-2712. Disqualified person holding office.

18-2701. Bribery of executive officers. — Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as such officer, is guilty of a felony. [I.C., § 18-2701, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 93; R.S., R.C., & C.L., § 6380; C.S., § 8118; I.C.A., § 17-501 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. "Bribery" defined, § 18-101.

Bribery of county and municipal officers, § 18-1309.

Bribery of judicial officers, § 18-1301 et seq.

Bribery of legislators, §§ 18-4703, 18-4704.

Bribery prosecution, incriminating testimony required in, § 18-1308.

Crimes against the revenue and property of the state, § 18-5701 et seq.

Penalty for felony when not otherwise provided, § 18-112.

Prosecuting Attorney.

Prosecuting attorney is not executive officer within meaning of this section. *State v. Wharfield*, 41 Idaho 14, 236 P. 862 (1925).

Collateral References. 12 Am. Jur. 2d, Bribery, § 1 et seq.

63A Am. Jur. 2d, Public Officers and Employees, § 1 et seq.

11 C.J.S., Bribery, § 1 et seq.

67 C.J.S., Officers, § 1 et seq.

Coconspirator, liability as of one cooperating in bribery which he was incapable of

committing personally. 5 A.L.R. 783; 74 A.L.R. 1110; 131 A.L.R. 1322.

Entrapment to commit crime. 18 A.L.R. 152; 66 A.L.R. 478; 86 A.L.R. 263.

Charge of bribery or cognate offense predicated upon an unaccepted offer by or to an official. 52 A.L.R. 816.

Contempt by bribery, or attempting to bribe, jurors. 63 A.L.R. 1274.

Candidate, statement by, regarding salary or fees of office as bribery. 106 A.L.R. 493.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be officer. 115 A.L.R. 1263.

Admissibility of evidence tending to show commission of other bribery or acceptance of bribe, and prosecution for bribery or accepting bribes. 20 A.L.R.2d 1012.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery. 55 A.L.R.2d 1137.

Entrapment to commit bribery or offer to bribe. 69 A.L.R.2d 1397.

Criminal liability of corporations for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Pardon as restoring public office or license or eligibility therefor. 58 A.L.R.3d 1191.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery. 67 A.L.R.3d 1231.

Officer's lack of authority as affecting offense. 73 A.L.R.3d 374.

Who is public official within meaning of

federal statute punishing bribery of public official (18 U.S.C.A. § 201). 161 A.L.R. Fed. 491.

18-2702. Asking or receiving bribes. — Every executive officer or person elected or appointed to an executive office who asks, receives or agrees to receive, any bribe upon any agreement or understanding that his vote, opinion or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is guilty of a felony and forfeits his office. [I.C., § 18-2702, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 94; R.S., R.C., & C.L., § 6381; C.S., § 8119; I.C.A., § 17-502 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

ANALYSIS

Accomplices.

Conspiracy to commit bribery.

Evidence.

Instructions.

Jeopardy.

Police officer.

Accomplices.

The bribe giver is not an accomplice with the bribe taker since he is guilty of a separate and distinct offense. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Conspiracy to Commit Bribery.

Person who is not capable of receiving bribe because of not being an officer, may be guilty of conspiring to commit bribery with person who is an officer. *State v. Myers*, 36 Idaho 396, 211 P. 440 (1922).

Evidence.

In a prosecution for bribery, evidence tending to prove guilt will not be excluded because it also tends to prove officer guilty of another crime. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Instructions.

An instruction that evidence of receiving other bribes had been admitted to show de-

sign and system on the theory that if defendant practiced a general system of receiving bribes, it would be more probable that he had asked and received the bribe in issue, was not prejudicial where other instructions clearly stated all elements necessary for a conviction. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Jeopardy.

It is immaterial whether a police officer is prosecuted under this section or some other section for receiving a bribe, since a prosecution for receiving bribes under any section would bar a prosecution under any other section for bribery. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Police Officer.

A police officer is an executive officer within this section. An officer who is neither a judicial nor legislative officer necessarily belongs to the executive department of the government, and is an executive or administrative officer, whether it be state, county or precinct office. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

An indictment in the language of the statute that a police officer asked for and received from a named person a bribe of \$15.00 at a specified time upon agreement that his action as such officer would be influenced by such bribe, and that such officer would protect the giver in the illegal operation of a hotel as a disorderly house, is sufficient. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Collateral References. Conviction of de facto officer. 115 A.L.R. 1263.

Bribery when act in contemplation is not within officer's authority. 73 A.L.R.3d 374.

18-2703. Resisting officers. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-2703, as added by 1972,

ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1.

18-2704. Asking or receiving rewards. — Every executive officer who asks or receives any emolument, gratuity or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. [I.C., § 18-2704, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 113; R.S., R.C., & C.L., § 6383; C.S., § 8121; I.C.A., § 17-504 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2705. Officers not to purchase scrip. — Every officer or person prohibited by the laws of this state from becoming a purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than \$1,000 or by imprisonment in the state prison not more than five years. [I.C., § 18-2705, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1875, p. 667, § 5; R.S., R.C., & C.L., § 6384; C.S., § 8122; I.C.A., § 17-505 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 67-455A.

Cited in: Clark v. Utah Constr. Co., 51 Idaho 587, 8 P.2d 454 (1932); Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932).

Application of Section.

County commissioner purchasing county warrants as agent for wife comes under provisions of this section. Libby v. Pelham, 30 Idaho 614, 166 P. 575 (1917).

18-2706. Presentation of fraudulent accounts. — Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher or writing, is guilty of a felony. [I.C., § 18-2706, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6385; C.S., § 8123; I.C.A., § 17-506 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Sec. to sec. ref. This section is referred to in §§ 18-7803, 36-1108, 36-1109 and 67-2017.

(1904); State v. Curtis, 29 Idaho 724, 161 P. 578 (1916).

Presenting False Bounty Claims.

Prosecution for presenting false bounty claim to board of county commissioners may be maintained under this section, although accused might also be prosecuted for making false affidavit to claim under 1901, p. 205, § 4. State v. Adams, 10 Idaho 591, 79 P. 398 (1905).

When Offense Consummated.

Offense defined by this section is consummated when a false or fraudulent claim is presented with intent to defraud; it is not necessary that fraudulent claim be allowed or paid in order to procure a conviction. State v. Adams, 10 Idaho 591, 79 P. 398 (1905).

ANALYSIS

Information.

Presenting false bounty claims.

When offense consummated.

Information.

Information under this section held sufficient. State v. Adams, 9 Idaho 582, 75 P. 258

18-2707. Buying appointments. — Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor. [I.C., § 18-2707, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6386; C.S., § 8124; I.C.A., § 17-507 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-2708. Making appointments for reward. — Every public officer who for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding \$5,000, and in addition thereto forfeits his office. [I.C., § 18-2708, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 115; R.S., R.C., & C.L., § 6387; C.S., § 8125; I.C.A., § 17-508 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2709. Intrusion into office — Holding over. — Every person who wilfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, wilfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor. [I.C., § 18-2709, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6388; C.S., § 8126; I.C.A., § 17-509 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: People ex rel. Gorman v. Havird, 2 Idaho (Hasb.) 531, 25 P. 294 (1889).

18-2710. Withholding books and records from successor. — Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, wilfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents or other writings appertaining or belonging to his office, or mutilates, destroys or takes away the same, is guilty of a felony. [I.C., § 18-2710, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 97; R.S., R.C., & C.L., § 6389; C.S., § 8127; I.C.A., § 17-510 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Photographic or digital retention of records and disposition of originals, § 9-328.

18-2711. Application of chapter. — The various provisions of this chapter apply to administrative and ministerial officers, in the same manner as if they were mentioned therein. [I.C., § 18-2711, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6390; C.S., § 8128; I.C.A., § 17-511 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-2712. Disqualified person holding office. — Every person not a legal voter and possessing all the qualifications prescribed for voters, or who is under any disqualification created by the laws of this state, who holds or exercises any office, is guilty of a misdemeanor. [I.C., § 18-2712, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1885, p. 106, § 44; R.S., R.C., & C.L., § 6391; C.S., § 8129; I.C.A., § 17-512 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

CHAPTER 28

EXTORTION

SECTION.

18-2801 — 18-2808. [Repealed.]

18-2801 — 18-2808. Extortion. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-2801 — 18-2808, as added by 1972, ch. 336, § 1, p. 844 were

repealed by S.L. 1981, ch. 183, § 1. For present law, see §§ 18-2401 — 18-2409.

CHAPTER 29

FALSE IMPRISONMENT

SECTION.

18-2901. False imprisonment defined.

18-2902. Punishment.

18-2901. False imprisonment defined. — False imprisonment is the unlawful violation of the personal liberty of another. [I.C., § 18-2901, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 49; R.S., R.C., & C.L., § 6721; C.S., § 8245; I.C.A., § 17-1215 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: State v. Richardson, 95 Idaho 446, 511 P.2d 263 (1973).

ANALYSIS

Civil actions for false imprisonment.
In general.
Instructions.

Civil Actions for False Imprisonment.

In action for damages for false imprisonment, where it is alleged that the arrest is an unlawful violation of the personal liberty of

another, and evidence is conflicting, it is error for trial court to withdraw said cause from jury and sustain a motion for nonsuit. *Ludwig v. Ellis*, 22 Idaho 475, 126 P. 769 (1912).

Where magistrate who issues warrant of arrest has no jurisdiction of person or subject-matter, he is liable in action in damages for false imprisonment. *Harkness v. Hyde*, 31 Idaho 784, 176 P. 885 (1918).

In General.

The essential elements of false imprisonment are set forth and enumerated. There need be no force or threats, nor is it necessary that the wrongful act be committed with malice or ill will, nor need it be under color of legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty — compelled to remain or go where he does not wish to — prevented from moving from place to place as he may desire, without authority and by any means whatever. *Griffin v. Clark*, 55 Idaho 364, 42 P.2d 297 (1935).

Instructions.

Trial court's refusal to give jury instruction correctly requested by defendant that the offense of false imprisonment is a lesser included offense within the crime of kidnapping was error. *State v. Wilcott*, 103 Idaho 766, 653 P.2d 1178 (1982).

Collateral References. 32 Am. Jur. 2d, False Imprisonment, § 1 et seq.

35 C.J.S., False Imprisonment, § 1 et seq.

Liability, for false imprisonment or arrest, of a private person answering call of known or asserted peace or police officer to assist in making arrest which turns out to be unlawful. 29 A.L.R.2d 825.

When statute of limitations begins to run against action for false imprisonment or false arrest. 49 A.L.R.2d 922.

Truant or attendance officer process liability for false imprisonment. 62 A.L.R.2d 1328.

Principal process liability for false arrest or imprisonment caused by agent or servant. 92 A.L.R.2d 15; 93 A.L.R.3d 826.

Right, without judicial proceeding, to arrest and detain one who is, or is suspected of being, mentally deranged. 92 A.L.R.2d 570.

Delay in taking before magistrate or denial of opportunity to give bail, criminal liability for. 98 A.L.R.2d 966; 3 A.L.R.4th 1057.

Entrapment as precluding justification of arrest or imprisonment. 15 A.L.R.3d 963.

Liability for false imprisonment predicated upon institution of, or conduct in connection with, insanity proceedings. 30 A.L.R.3d 523.

Liability of one contracting for private police or security service for acts of personnel supplied. 38 A.L.R.3d 1332.

Modern status of rules as to right to forcefully resist illegal arrest. 44 A.L.R.3d 1078.

False imprisonment as included offense with charge of kidnapping. 68 A.L.R.3d 828.

Immunity of prosecuting attorney or similar officer from action for false arrest or imprisonment. 79 A.L.R.3d 882.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases. 6 A.L.R.4th 1066.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested. 39 A.L.R.4th 705.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases. 6 A.L.R.4th 1066.

18-2902. Punishment. — False imprisonment is punishable by fine not exceeding \$5000, or by imprisonment in the county jail not more than one (1) year, or both. [I.C., § 18-2902, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 49; R.S., R.C., & C.L., § 6722; C.S., § 8246; I.C.A., § 17-1216 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

CHAPTER 30

FALSE PERSONATION — FRAUDULENT MARRIAGES

SECTION.

18-3001. False personation.

18-3002. Receiving money or property under false personation.

18-3003. Marriage under false personation.

SECTION.

18-3004. Solemnizing marriage without authority.

18-3005. Intimidation by false assertion of authority.

18-3001. False personation. — Every person who falsely personates another, and in such assumed character, either:

1. Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take such bail or surety; or

2. Verifies, publishes, acknowledges or proves in the name of another person, any written instrument, with the intent that the same may be recorded, delivered and used as true; or

3. Does any act whereby, if it were done by the person falsely personated, he might in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture or penalty, or whereby any benefit might accrue to the party personating, or to any other person;

Is punishable by imprisonment in the county jail not exceeding two (2) years, or by a fine not exceeding \$5000. [I.C., § 18-3001, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 98; R.S., R.C., & C.L., § 7093; C.S., § 8471; I.C.A., § 17-3810 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Illegal arrest, search or seizure, § 18-703.

Collateral References. 32 Am. Jur. 2d, False Personation, § 1 et seq.

35 C.J.S., False Personation, § 1 et seq.

Intent as affecting false personation. 97 A.L.R. 1510.

18-3002. Receiving money or property under false personation.

— Every person who falsely personates another, and in such assumed character receives any money or property knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or that of another person, or to deprive the owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received. [I.C., § 18-3002, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 99; R.S., R.C., & C.L., § 7094; C.S., § 8472; I.C.A., § 17-3811 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: State v. Boyenger, 95 Idaho 396, 509 P.2d 1317 (1973).

18-3003. Marriage under false personation. — Every person who falsely personates another, and in such assumed character marries or pretends to marry, or sustain the marriage relation towards another, with or without the connivance of such other, is guilty of a felony. [I.C., § 18-3003, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 98; R.S., R.C., & C.L., § 7090; C.S., § 8469; I.C.A., § 17-3808 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-3004. Solemnizing marriage without authority. — Every person who undertakes or pretends to join others in marriage, knowing that he is not by law authorized so to do, or knowing of any legal impediment to the

proposed marriage, is guilty of a misdemeanor. [I.C., § 18-3004, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1877, p. 24, § 18; R.S., R.C., & C.L., § 7092; C.S., § 8470; I.C.A., § 17-3809 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-3005. Intimidation by false assertion of authority. — (1) Any person who either:

- (a) Deliberately impersonates or falsely acts as a public officer or tribunal, public employee or any law enforcement authority in connection with or relating to any actual or purported legal process affecting persons or property; or
- (b) Simulates legal process including, but not limited to, actions affecting title to real or personal property, indictments, subpoenas, warrants, injunctions, liens, orders, judgments, or any legal documents or proceedings; knowing or having reason to know the contents of any such documents or proceedings or the basis for any action to be fraudulent; or
- (c) While acting falsely in asserting authority of law takes action against persons or property; or
- (d) While acting falsely in asserting authority of law attempts in any way to influence, intimidate, or hinder a public official or law enforcement officer in the discharge of his official duties by means of, but not limited to, threats of or actual physical abuse, harassment, or through the use of simulated legal process;

Is punishable by imprisonment in the county jail for a period not to exceed one (1) year, or by a fine not to exceed one thousand dollars (\$1,000) or both.

- (2)(a) Nothing in this section shall make unlawful any act of any law enforcement officer or legal tribunal which is performed under lawful authority; and
- (b) Nothing in this section shall prohibit individuals from assembling freely to express opinions or designate group affiliation or association; and
- (c) Nothing in this section shall prohibit or in any way limit a person's lawful and legitimate access to the courts or prevent a person from instituting or responding to legitimate and lawful legal process. [I.C., § 18-3005, as added by 1997, ch. 149, § 1, p. 426.]

CHAPTER 31

FALSE PRETENSES, CHEATS AND MISREPRESENTATIONS

SECTION.

- 18-3101. Pyramid promotional schemes prohibited — Penalties — Sale of interest voidable — Scope of remedy.
- 18-3102 — 18-3104. [Repealed.]
- 18-3105. False statement by commission merchant, broker, agent, factor or consignee to principal or consignor.

SECTION.

- 18-3106. Drawing check without funds — Drawing check with insufficient funds — Prima facie evidence of intent — Standing of person having acquired rights — Probation conditions.
- 18-3107. [Amended and Redesignated.]
- 18-3108 — 18-3121. [Repealed.]
- 18-3122. Definitions.

SECTION.

18-3123. Forgery of a financial transaction card.

18-3124. Fraudulent use of a financial transaction card or number.

18-3125. Criminal possession of financial transaction card, financial transaction number and FTC forgery devices.

SECTION.

18-3125A. Unauthorized factoring of credit card sales drafts.

18-3126. Misappropriation of personal identifying information.

18-3127. Receiving or possessing fraudulently obtained goods or services.

18-3128. Penalty for violation.

18-3101. Pyramid promotional schemes prohibited — Penalties — Sale of interest voidable — Scope of remedy. — (1) It is illegal and prohibited for any person, or any agent or employee thereof, to establish, promote, offer, operate, advertise or grant participation in any pyramid promotional scheme.

(2) As used in this section:

(a) “Appropriate inventory repurchase program” means a program by which a plan or operation repurchases, upon request at the termination of a participant’s business relationship with the plan or operation and based upon commercially reasonable terms, current and marketable inventory purchased and maintained by the participant for resale, use or consumption, provided such plan or operation clearly describes the program in its recruiting literature, sales manual, or contracts with participants, including the manner in which the repurchase is exercised and disclosure of any inventory that is not eligible for repurchase under the program.

(b) “Commercially reasonable terms” means the repurchase of current and marketable inventory within twelve (12) months from the date of original purchase at not less than ninety percent (90%) of the original net cost to the participant, less appropriate set-offs and legal claims, if any. In the case of service products, the repurchase of such service products shall be on a pro rata basis, unless clearly disclosed otherwise to the participant, in order to qualify as “commercially reasonable terms.”

(c) “Compensation” means a payment of any money, thing of value, or financial benefit.

(d) “Consideration” means a payment of any money, or the purchase of goods, services, or intangible property but shall not include:

1. The purchase of goods or services furnished at cost to be used in making sales and not for resale.

2. Time and effort spent in pursuit of sales or recruiting activities.

(e) “Current and marketable” includes inventory that, in the case of consumable or durable goods, is unopened, unused and within its commercially reasonable use of shelf-life period. In the case of services and intangible property, including internet sites, “current and marketable” means the unexpired portion of any contract or agreement. The term “current and marketable” does not include inventory that has been clearly described to the participant prior to purchase as a seasonal, discontinued, or special promotion product not subject to the plan or operation’s inventory repurchase program.

(f) “Inventory” includes both goods and services, including company-produced promotional materials, sales aids and sales kits that the plan or operation requires independent salespersons to purchase.

(g) "Inventory loading" means that the plan or operation requires or encourages its independent salespersons to purchase inventory in an amount that unreasonably exceeds that which the salesperson can expect to resell for ultimate consumption, or to use or consume, in a reasonable time period.

(h) "Participant" means a natural person who joins a plan or operation.

(i) "Person" means a natural person, partnership, corporation, trust, estate, business trust, joint venture, unincorporated association, or any other legal or commercial entity.

(j) "Promote" means to contrive, prepare, establish, plan, operate, advertise or otherwise induce or attempt to induce another person to be a participant.

(k) "Pyramid promotional scheme" means any plan or operation in which a participant gives consideration for the right to receive compensation that is derived primarily from the recruitment of other persons as participants in the plan or operation rather than from the sales of goods, services or intangible property to participants or by participants to others.

(3) A limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility, or upon payment of anything of value by a person whereby the person obtains any other property in addition to the right to receive consideration, does not change the identity of the scheme as a pyramid promotional scheme.

(4) Any person, or any agent or employee thereof who willfully and knowingly promotes, offers, advertises, or grants participation in a pyramid promotional scheme shall be guilty of a felony.

(5) All pyramid promotional schemes offered by the same person, or agents or employees thereof, or any person controlled by or affiliated with such person, for the same type of consideration, at substantially the same period of time and for the same general purpose, shall be deemed to be one (1) integrated pyramid promotional scheme, even though such pyramid promotional schemes may be given different names or other designations.

(6) Nothing in this section or in any rule promulgated pursuant to this section shall be construed to prohibit a plan or operation, or to define such plan or operation as a pyramid promotional scheme, based upon the fact that participants in the plan or operation give consideration in return for the right to receive compensation based upon purchases of goods, services or intangible property by participants for personal use, consumption or resale, provided the plan or operation implements an appropriate inventory repurchase program and does not promote inventory loading.

(7) Any violation of this section shall also be deemed an unfair and deceptive practice in violation of the Idaho consumer protection act. Any person aggrieved by a violation of this section can recover monetary damages pursuant to the Idaho consumer protection act.

(8) The rights and remedies that are granted under the provisions of this section to purchasers in pyramid promotional schemes are independent of and in addition to any other right or remedy available to them in law or equity, and nothing contained herein shall be construed to diminish or abrogate any such right or remedy. [I.C., § 18-3101, as added by 1983, ch. 241, § 1, p. 648; am. 2004, ch. 51, § 1, p. 239.]

Compiler's notes. Former § 18-3101 which comprised I.C., § 18-3101, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 183, § 1.

Another former § 18-3101, which comprised Cr. & P. 1864, §§ 136, 137; R.S. & R.C., § 7096; 1909, p. 20, H.B. 112; reen. C.L., § 7096; C.S., § 8474; I.C.A., § 17-3902 was

repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

The Idaho consumer protection act referred to in subsection (7) is compiled as §§ 48-601 — 48-608, 48-610 — 48-619.

Cited in: Fremont-Madison Irrigation Dist. v. United States Dep't of Interior, 763 F.2d 1084 (9th Cir. 1985).

18-3102 — 18-3104. False statements to obtain money, cash or credit — Obtaining real property by false pretenses — Selling land twice. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-3102 — 18-3104, as added by 1972, ch. 336, § 1, p. 844 were

repealed by S.L. 1981, ch. 183, § 1. For present law see §§ 18-2401 — 18-2409.

18-3105. False statement by commission merchant, broker, agent, factor or consignee to principal or consignor. — Every commission merchant, broker, agent, factor or consignee who shall wilfully and corruptly make, or cause to be made, to the principal or consignor of such commission merchant, agent, broker, factor or consignee, a false statement concerning the price obtained for, or the quality or quantity of any property consigned or entrusted to, such commission merchant, agent, broker, factor or consignee, for sale, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$300.00, or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment. [I.C., § 18-3105, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C.* & C.L., § 7099; C.S., § 8478; I.C.A., § 17-3906 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3106. Drawing check without funds — Drawing check with insufficient funds — Prima facie evidence of intent — Standing of person having acquired rights — Probation conditions. — (a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud shall make or draw or utter or deliver, or cause to be made, drawn, uttered or delivered, any check, draft or order for the payment of money upon any bank or depository, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has no funds in or credit with such bank or depository, or person, or firm, or corporation, for the payment in full of such check, draft or order upon its presentation, although no express representation is made with reference thereto, shall upon conviction be punished by imprisonment in the state prison for a term not to exceed three (3) years or by a fine not to exceed fifty thousand dollars (\$50,000) or by both such fine and imprisonment.

(b) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud

shall make, draw, utter or deliver, or cause to be made, drawn, uttered or delivered, any check, draft or order for the payment of money in the sum of two hundred fifty dollars (\$250) or more, or any series of transactions as defined in subsection (f) of this section, upon any bank or depository, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has some but not sufficient funds in or credit with such bank or depository, or person, or firm, or corporation, for the full payment of such check, draft or order or series of transactions upon presentation, although no express representation is made with reference thereto, shall upon conviction be punished by imprisonment in the state prison for a term not to exceed three (3) years, or by a fine not to exceed fifty thousand dollars (\$50,000), or by both such fine and imprisonment.

(c) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, shall make, draw, utter or deliver, or cause to be made, drawn, uttered, or delivered, any check, draft or order for payment of money, in a sum less than two hundred fifty dollars (\$250), which is not part of a series of transactions as defined in subsection (f) of this section, upon any bank or depository, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has some but not sufficient funds in or credit with such bank or depository, or firm, or person, or corporation, for the full payment of such check, draft or order upon its presentation, although no express representation is made with reference thereto, shall upon conviction for a first offense be punished by imprisonment in the county jail for a term not exceeding six (6) months, or by a fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment; and upon a second conviction the person so convicted shall be punished by imprisonment in the county jail for a term not exceeding one (1) year, or by a fine not exceeding two thousand dollars (\$2,000), or by both such fine and imprisonment; provided, however, that upon a third or subsequent conviction, the person so convicted shall be punished by imprisonment in the state prison for a term not exceeding three (3) years, or by a fine not exceeding fifty thousand dollars (\$50,000), or by both such fine and imprisonment.

(d) As against the maker or drawer thereof, the making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud and of knowledge of no funds or insufficient funds, as the case may be, in or credit with such bank, or depository, or person, or firm, or corporation, for the payment in full of such check, draft or order upon its presentation. This prima facie intent to defraud and knowledge of no funds or insufficient funds, as the case may be, shall not be negated by evidence that the check draft or order was for payment of a preexisting debt, including open accounts. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository, or person, or firm, or corporation upon whom such check, draft or order is drawn for the payment of such check, draft or order.

(e) Any person having acquired rights with respect to a check which is not paid because the drawer has no funds, no account or insufficient funds, shall have standing to file a complaint under this section, regardless of whether he is the payee, holder or bearer of the check.

(f) For purposes of this section a "series of transactions" means a series of checks, drafts or orders for the payment of money which are less than two hundred fifty dollars (\$250.00) individually but in the aggregate total two hundred fifty dollars (\$250) or more, and which are made, uttered, drawn or delivered in violation of this section as part of a common scheme or plan.

(g) If a sentence of probation is ordered for violation of this section, the court as a condition of probation may require the defendant to make restitution on all checks issued and which are unpaid at the date of commencement of the probation in addition to any other terms and conditions appropriate for the treatment and rehabilitation of the defendant. [I.C., § 18-3106, as added by 1972, ch. 336, § 1, p. 844; am. 1979, ch. 214, § 1, p. 597; am. 1994, ch. 184, § 1, p. 601; am. 1996, ch. 306, § 1, p. 1004; am. 1998, ch. 324, § 1, p. 1048.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 41, § 1; R.C., § 7101; 1915, ch. 129, § 1, p. 286; C.L., § 7101; C.S., § 8480; I.C.A., § 17-3908; 1949, ch. 111, § 1, p. 201; 1959, ch. 115, § 1, p. 250; 1961, ch. 241, § 1, p. 394 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 1998, ch. 324 provided: "The provisions of this act [which amended this section] shall apply to violations of section 18-3016 [18-3106], Idaho Code, committed on and after July 1, 1998."

Cited in: *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974); *State v. Slinger*, 109 Idaho 363, 707 P.2d 474 (Ct. App. 1985); *State v. Douglas*, 118 Idaho 622, 798 P.2d 467 (Ct. App. 1990).

ANALYSIS

Any bank.
Application.
Bankruptcy code.
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Elements of offense.
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Moral turpitude.
Pleas.
Postdated checks.
Prima facie case.
Proof.
Proper charge.
Sentence.
Violations.

Any Bank.

The term "any bank" is general, and includes any bank whether located within or without the state. *State v. Campbell*, 70 Idaho 408, 219 P.2d 956 (1950).

Application.

Completion of the offense under the former section did not depend upon the success of the enterprise or that there be a completed delivery, nor was the former section concerned with the obtaining of money or property by false pretenses; it was complete when the maker, with intent to defraud, made or uttered the check, knowing that he had no funds or credit with the bank at that time. *State v. Campbell*, 70 Idaho 408, 219 P.2d 956 (1950).

In a case where the evidence available to the prosecuting attorney justifies a belief on his part that the accused obtained money or property by means of a false check, he may elect to prosecute under the provisions of § 18-3101. *State v. Roderick*, 85 Idaho 80, 375 P.2d 1005 (1962).

Bankruptcy Code.

Where defendant admitted to the state court in a prosecution under this section that he delivered checks to plaintiff knowing that he did not have the funds on deposit to cover the checks and that he did so wilfully and with the intent to defraud plaintiff, such findings supported a claim in favor of plaintiff over defendant under § 1-2301A for the amount of the checks and in addition supported a finding that the indebtedness created thereby was exempted from defendant's discharge under the Bankruptcy Code. *Itano Farms, Inc. v. Currey*, 154 Bankr. 977 (Bankr. D. Idaho 1993).

Constitutionality.

The former section was not unconstitutional on ground that it provided no satisfactory standards by which to judge guilt, nor was it unconstitutional as providing for improper presumptions. *State v. Campbell*, 70 Idaho 408, 219 P.2d 956 (1950).

Elements of Offense.

Under the provisions of the former section, the crime was completed upon the drawing, uttering or delivering of the check under the circumstances herein stated and it was not necessary in such case for the state to allege or prove that the accused obtained any money or property by means of the check. *State v. Roderick*, 85 Idaho 80, 375 P.2d 1005 (1962).

Evidence.

Evidence of previous checks issued without funds, shortly before check in issue, was admissible as to his intent to defraud. *State v. Sedam*, 62 Idaho 26, 107 P.2d 1065 (1940).

Where there was a conflict in evidence as to date check was given, date merchandise was purchased for which check was given, and as to whether instructions had been given to hold check a few days, such matters were within exclusive province of the jury. *State v. Eikelberger*, 72 Idaho 245, 239 P.2d 1069 (1951).

Where the parties, in an action for issuing a check with insufficient funds, agreed that if the defendant's bank statement had not been lost it would have been admissible under the business records exception, a hearsay objection concerning a reconstruction of that lost statement was inapplicable; once the original evidence had withstood a hearsay objection, secondary evidence of that original was not subject to a hearsay analysis. *State v. White*, 102 Idaho 924, 644 P.2d 318 (1982).

Information.

An information substantially in the language of the statute is sufficient. *State v. Sedam*, 62 Idaho 26, 107 P.2d 1065 (1940).

Instructions.

Where a worthless check is issued as the false token to accomplish the fraudulent purpose, an instruction in substance that if the jury finds that on or before the delivery of the check involved there was an agreement between the two that the check would be held and not immediately cashed then the defendant should be acquitted, on the other hand if the jury finds there was no such agreement then the delivery of said check would be prima facie evidence of false intent and intent to defraud, was proper. *State v. Davis*, 81 Idaho 61, 336 P.2d 692 (1959).

In a prosecution under this section a trial court should instruct the jury regarding an inference of fraudulent intent arising from

presentation of an insufficient funds check rather than a presumption; the jury shall be instructed that the burden of proof as to intent is not shifted to the defendant. Shifting of the burden by means of a mandatory presumption is a violation of due process. *State v. Hebner*, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985).

Intent.

Intent to defraud is question of fact for jury. *State v. Sedam*, 62 Idaho 26, 107 P.2d 1065 (1940).

In a prosecution for issuing an insufficient funds check, in which it was shown that defendant issued the check in payment of a preexisting debt, the state was required to prove beyond a reasonable doubt that defendant had the requisite intent to defraud, since the presumption of intent to defraud could not constitutionally be applied. *State v. Campbell*, 97 Idaho 331, 543 P.2d 1171 (1975).

Where the record indicated that defendant charged with issuing a check with insufficient funds confessed to the police that he knew the account did not contain sufficient funds at the time he tendered the check, where defendant also testified at trial that he knew the account had insufficient funds when he tendered the check, and where defendant never attempted to make reparations prior to the filing of the complaint against him, based on such evidence a jury reasonably could infer that defendant intended to defraud at the time he tendered the check. *State v. Steele*, 118 Idaho 793, 800 P.2d 680 (Ct. App. 1990).

Judgment.

Where maximum sentence for conviction for drawing a check without funds was six months at the time the crime was committed, judgment placing defendant on probation for two years was excessive, but judgment of probation was valid for period of six months. *State v. Eikelberger*, 71 Idaho 282, 230 P.2d 696 (1951).

Moral Turpitude.

Because fraud is an element of the crime, it involves moral turpitude so as to justify disbarment. *In re Mills*, 71 Idaho 128, 227 P.2d 81 (1951).

Pleas.

After pleading guilty to two counts of issuing a check without funds, defendant was sentenced pursuant to a plea agreement to a determinate term of three years' confinement on the first count and to a consecutive indeterminate term of three years on the second count. The court would not set aside defendant's plea without a showing of just cause. *State v. Akin*, — Idaho —, 75 P.3d 214 (Ct. App. 2003).

Postdated Checks.

A drawer who knowingly and intentionally issues a postdated check in the regular course of business without sufficient funds in or credit with the drawee bank for the payment thereof in full upon presentation and who neither calls to the attention of the payee that it is postdated nor makes any arrangements with the payee to hold the check commits the crime of drawing a check without funds. *State v. Ramsbottom*, 89 Idaho 1, 402 P.2d 384 (1965).

Prima Facie Case.

Giving of check with knowledge that there is not sufficient funds in designated bank to cover check makes out a prima facie case of intent to defraud. *State v. Eikelberger*, 72 Idaho 245, 239 P.2d 1069 (1951).

Where defendant was aware that his account had been regularly overdrawn but made no inquiry to the bank regarding an expected deposit, defendant failed to overcome the prima facie case established by proof of the drawing and uttering of insufficient funds checks. *State v. Cochran*, 97 Idaho 71, 539 P.2d 999 (1975).

Proof.

In prosecution under former section, it is not necessary for state to plead and prove that the check was presented and payment refused by the drawee bank. *State v. Campbell*, 70 Idaho 408, 219 P.2d 956 (1950).

Proper Charge.

Contention of defendant that information was insufficient to charge a public offense, because it did not allege that he did not have "credit" with the bank for the payment of check was of no avail since the word "credit" appears in the former section and the information was not drawn under that statute but rather under former law that provided that obtaining money by false or fraudulent representation defrauds another of money and information sufficiently charged the crime of obtaining money by false pretenses as therein defined. *State v. Roderick*, 85 Idaho 80, 375 P.2d 1005 (1962).

Sentence.

State Board of Correction did not have power or authority to increase sentence of defendant from one to five years for conviction of the crime of issuing a check without funds where district court sentenced the defendant for one year instead of the statutory period of five years, since the district court did not correct the sentence, and the state did not file a motion to correct the sentence or take an appeal from said sentence. *Spanton v. Clapp*, 78 Idaho 234, 299 P.2d 1103 (1956).

Where defendant had been advised of a possible three-year maximum sentence on each count of uttering and delivering a check with insufficient funds, the trial court did not err in imposing three concurrent three-year sentences and one consecutive three-year sentence upon defendant's plea of guilty to each count, even though defendant was not specifically advised of the court's discretion to impose consecutive sentences. *State v. Morris*, 97 Idaho 273, 543 P.2d 498 (1975).

Trial court did not abuse its discretion in imposing 30-day jail term in addition to two years' probation even considering defendant's prior record, her age and the fact that she was the mother of a young child. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

The trial court did not err in sentencing the defendant to a three-year indeterminate term of imprisonment for each of eight counts of drawing checks with insufficient funds and one seven-year indeterminate term of imprisonment on grand theft conviction to run consecutive to the other terms, where defendant had prior criminal record and was out on bond when grand theft occurred. *State v. Brewster*, 106 Idaho 145, 676 P.2d 720 (1984).

Concurrent indeterminate sentences of two years for the driving under the influence, two years for the insufficient funds check and five years for the malicious injury to property was not an abuse of discretion where the defendant had an extensive criminal record when he committed the offenses, he suffered from severe alcoholism superimposed over a diagnosed aggressive personality disorder, creating a distinct potential for future violent behavior, and the presentence investigator concluded that he was a poor candidate for probation. *State v. Bolton*, 114 Idaho 269, 755 P.2d 1307 (Ct. App. 1988).

Where defendant was charged with two counts of issuing a check without funds, and at that time was on parole for a previous forgery conviction, defendant failed to show that his sentence was unreasonable, or that the District Court abused its discretion in denying his motion to reconsider a three-year unified sentence with one year fixed. *State v. Elliott*, 121 Idaho 48, 822 P.2d 567 (Ct. App. 1991).

A unified sentence of three years with a minimum period of confinement of two years rather than probation, for one count of issuing a closed account check, was not an abuse as discretion where defendant had previously been charged four times with issuing no-account checks, once with the issuance of an insufficient funds check and once for unauthorized use of a bank check. *State v. Domine*, 121 Idaho 887, 828 P.2d 916 (Ct. App. 1992).

The sentences imposed by the district court

were reasonable and there was no basis to hold that the district court initially abused its discretion in ordering a grand theft sentence to be served consecutively to one imposed for issuing a check without sufficient funds. *State v. Teske*, 123 Idaho 975, 855 P.2d 60 (Ct. App. 1993).

Although the district court failed to specify a minimum period of confinement with regard to a consecutive, three-year indeterminate sentence imposed on defendant on count two of issuing checks without funds, in addition to a three-year fixed sentence on count one, because the record showed that the court intended to set the minimum period of confinement at zero, the sentence did not violate the requirements of § 19-2513 that the aggregate sentence not exceed the maximum provided by law; yet case had to be remanded for correction of the form of judgment to specify no minimum period of confinement had been ordered on the count two conviction. *State v. Martinsen*, 128 Idaho 472, 915 P.2d 34 (Ct. App. 1996).

Sentence of defendant, convicted on two counts of issuing checks without funds, of a fixed three-year sentence on count one and an indeterminate three-year sentence with no minimum term of confinement specified on count two to be served consecutively, was reasonable and neither excessive nor an abuse of discretion in light of defendant's prior record; in reviewing a sentence imposed under the Unified Sentencing Act, the minimum period specified by the sentencing judge is treated as the probable duration of confinement and thus three years in this instance. *State v. Martinsen*, 128 Idaho 472, 915 P.2d 34 (Ct. App. 1996).

Based on the nature of defendant's offenses and the absence of any prior serious criminal record, the district court abused its discretion in imposing the harshest possible penalty by directing that the sentences for defendant's two counts of drawing a check without funds be served consecutively. *State v. Hoskins*, 131 Idaho 670, 962 P.2d 1054 (Ct. App. 1998).

Violations.

There is no violation if drawer informs payee at the time of tendering check that he does not have funds on hand to meet check. *State v. Eikelberger*, 72 Idaho 245, 239 P.2d 1069 (1951).

There is a violation, even though check is postdated, if drawer fails to inform payee that check is postdated, or fails to request payee to hold the check a few days. *State v. Eikelberger*, 72 Idaho 245, 239 P.2d 1069 (1951).

Collateral References. False representations in business transaction as within statute relating to "confidence game." 9 A.L.R. 1527; 56 A.L.R. 727.

Obtaining loan or renewal thereof as offense of confidence game. 24 A.L.R. 397; 52 A.L.R. 1167.

False pretense or confidence game through means of worthless check or draft. 35 A.L.R. 344; 174 A.L.R. 173.

Fraudulent or worthless check, false pretenses. 35 A.L.R. 346, 355; 43 A.L.R. 49; 95 A.L.R. 488; 174 A.L.R. 173.

Fraudulent check, variance between charge that check was given in payment of an obligation, and evidence that it was delivered as a cash payment, or vice versa. 143 A.L.R. 1076.

Constitutionality of "bad check" acts. 16 A.L.R.4th 631.

18-3107. [Amended and Redesignated.]

Compiler's notes. Former § 18-3107, which comprised I.C., § 18-3701, as added by 1982, ch. 156, § 1, p. 422; redesign. 1983, ch.

192, § 2, p. 521, was amended and redesignated as § 1-2301A by S.L. 1983, ch. 192, § 2.

18-3108. Proof of fraudulent intent in procuring food, lodging or other accommodations. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3108, as added by 1972,

ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 183, § 1. For present law, see § 18-2405.

18-3109. Proprietor of hotel, lodging house or eating house to post copy of law. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1903, p. 410, § 3; reen. R.C. &

C.L., § 7103b; C.S., § 8484; I.C.A., § 17-3912 was repealed by S.L. 1951, ch. 112, § 13.

18-3110. Jurisdiction of offenses against hotels, lodging or eating houses. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1903, p. 410, § 4; reen. R.C. & C.L., § 7103c; C.S., § 8485; I.C.A., § 17-3913, was repealed by S.L. 1969, ch. 111, § 18, to be effective at 12:01 A.M. on January 11, 1971.

18-3111. Fraudulent procurement of livery accommodations — Wilful or malicious abuse of animals or property. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3111 as added by S.L. 1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-3112. False, deceptive or misleading advertising. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1915, ch. 23, p. 74; reen. C.L., § 7104a; C.S., § 8487; I.C.A., § 17-3915 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and a § 18-3112 identical to the section repealed was added by S.L. 1972, ch. 336, § 1 and repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-3113 — 18-3121. Fraudulent use of credit cards — Intent to use telephone service to avoid payment — Possession of forged or fictitious altered or stolen credit cards — Fraudulently obtaining telecommunication service — Evidence — Penalty. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-3113 — 18-3121, as added by 1972, ch. 336, § 1, p. 844 were repealed by S.L. 1981, ch. 164, § 7.

18-3122. Definitions. — The following words and phrases used in this chapter mean: *

(1) "Authorized credit card merchant" means a person or organization who is authorized by an issuer to furnish money, goods, services or anything of value upon presentation of a financial transaction card or a financial transaction card account number by a card holder, and to present valid credit card sales drafts to the issuer for payment.

(2) "Automated banking device" means any machine which, when properly activated by a financial transaction card and/or a personal identification code, may be used for any of the purposes for which a financial transaction card may be used.

(3) "Card holder" means any person or organization named on the face of a financial transaction card to whom, or for whose benefit, a financial transaction card is issued by an issuer.

(4) "Credit card sales draft" means:

(a) Any sales slip, draft, voucher or other written or electronic record of a sale of goods, services or anything else of value made or purported to be made to or at the request of a card holder with a financial transaction card, financial transaction card account number or personal identification code; or

(b) Any evidence, however manifested, of any right or purported right to

collect from a card holder funds due or purported to be due with respect to any sale or purported sale.

(5) "Expired financial transaction card" means any financial transaction card which is no longer valid because the terms agreed to have been cancelled or have elapsed.

(6) "Financial transaction card" or "FTC" means any instrument or device known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, telephone credit card or by any other name issued by the issuer for the use of the card holder in obtaining money, goods, services, or anything else of value on credit, or in certifying or guaranteeing to a person or business the availability to the card holder of the funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such a person or business; or any instrument or device used in providing the card holder access to a demand deposit account or a time deposit account for the purpose of making deposits of money or checks therein, or withdrawing funds in the form of money, money orders, or traveler's checks or other representative of value therefrom or transferring funds from any demand account or time deposit account to any credit card account in full or partial satisfaction of any outstanding balance existing therein.

(7) "Financial transaction card account number" means the account number assigned by an issuer to a financial transaction card to identify and account for transactions involving that financial transaction card.

(8) "Issuer" means a business organization or financial institution or its duly authorized agent which issues a financial transaction card.

(9) "Personal identification code" means any numerical and/or alphabetical code assigned to the card holder of a financial transaction card by the issuer to permit the authorized electronic use of that FTC.

(10) "Personal identifying information" means the name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, checking account number, savings account number, financial transaction card number, or personal identification code of an individual person, or any other numbers which can be used to access a person's financial resources.

(11) "Revoked financial transaction card" means an FTC which is no longer valid because permission to use it has been suspended or terminated by the issuer with actual notice having been made upon the card holder. [I.C., § 18-3122, as added by 1981, ch. 164, § 1, p. 288; am. 1991, ch. 331, § 1, p. 856; am. 1999, ch. 124, § 1, p. 361.]

Compiler's notes. Section 2 of S.L. 1999, ch. 124 is compiled as § 18-3124.

18-3123. Forgery of a financial transaction card. — Any person who, with intent to defraud, counterfeits, falsely makes, embosses, or encodes magnetically or electronically any FTC, or who with intent to defraud, uses the financial transaction card account number or personal identification code of a card holder in the creation of a fictitious or counterfeit credit card sales draft, signs the name of another, or a fictitious

name to an FTC, sales slip, sales draft, credit card sales draft, or any instrument for the payment of money which evidences an FTC transaction, shall be guilty of forgery and shall be punished under the current forgery statutes of the state of Idaho. [I.C., § 18-3123, as added by 1981, ch. 164, § 2, p. 288; am. 1991, ch. 331, § 2, p. 856.]

Sec. to sec. ref. This section is referred to in § 18-7803.

18-3124. Fraudulent use of a financial transaction card or number. — It is a violation of the provisions of this section for any person with the intent to defraud:

(1) To knowingly obtain or attempt to obtain credit or to purchase or attempt to purchase any goods, property, or service, by the use of any false, fictitious, counterfeit, revoked, expired or fraudulently obtained FTC, by any FTC account number, or by the use of any FTC issued;

(2) To use an FTC or FTC number to knowingly and willfully exceed the actual balance of the demand deposit account or time deposit account;

(3) To use an FTC or FTC number to willfully exceed an authorized credit line in the amount of one thousand dollars (\$1,000) or more, or fifty percent (50%) of such authorized credit line, whichever is greater;

(4) To willfully deposit into his account or any other account by means of an automatic banking device, any false, forged, fictitious, altered or counterfeit check draft, money order, or any other such document;

(5) To make application for an FTC to an issuer, while knowingly making or causing to be made a false statement or report relative to his name, occupation, financial condition, assets, or to willfully and substantially [undervalue] any indebtedness for the purposes of influencing the issuer to issue an FTC; .

(6) To knowingly sell or attempt to sell credit card sales drafts to an authorized credit card merchant or any other person or organization, for any consideration whether at a discount or otherwise, or present or cause to be presented to the issuer or an authorized credit card merchant, for payment or collection, any credit card sales draft, or purchase or attempt to purchase any credit card sales draft for presentation to the issuer or an authorized credit card merchant for payment or collection if:

(a) Such draft is counterfeit or fictitious;

(b) The purported sale evidenced by such credit card sales draft did not take place;

(c) The purported sale was not authorized by the card holder;

(d) The items or services purported to be sold as evidenced by such credit card sales draft are not delivered or rendered to the card holder or person intended to receive them; or

(e) If purportedly delivered or rendered, such goods or services are of materially lesser value or quality from that intended by the purchaser, or are materially different from goods or services represented by the seller or his agent to the purchaser, or have substantial discrepancies from goods or services impliedly represented by the purchase price when compared with the actual goods or services purportedly delivered or rendered.

(7) To knowingly keep or maintain in any manner carbon or other impressions or copies of credit card sales drafts, and to use such impressions or copies for the purpose of creating any fictitious or counterfeit credit sales draft, or to engage in any other activity prohibited in this section. [I.C., § 18-3124, as added by 1981, ch. 164, § 3, p. 288; am. 1991, ch. 331, § 3, p. 856; am. 1999, ch. 124, § 2, p. 361; am. 2002, ch. 72, § 1, p. 158.]

Compiler's notes. The bracketed word "undervalue" in subdivision (5) was inserted by the compiler.

Sections 1 and 3 of S.L. 1999, ch. 124 are compiled as §§ 18-3122 and 18-3126, respectively.

Sec. to sec. ref. This section is referred to in §§ 18-3127, 18-3128 and 18-7803.

Sentence.

The district court imposed a sentence which was more severe than the period of confinement recommended by the state for the conviction of fraudulent use of a financial trans-

action card, apparently convinced that the modest sentences imposed on the defendant in the past had not deterred his criminal behavior and that there was a need to protect society from this continued conduct; in light of the sentencing criteria, the sentence of five years was reasonable. *State v. Morris*, 120 Idaho 571, 817 P.2d 1095 (Ct. App. 1991).

Collateral References. Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card. 106 A.L.R.5th 701.

18-3125. Criminal possession of financial transaction card, financial transaction number and FTC forgery devices. — It is a felony punishable as provided in subsection (3) of section 18-3128, Idaho Code, for any person:

(1) To acquire an FTC or FTC number from another without the consent of the card holder or the issuer, or to, with the knowledge that it has been so acquired, receive an FTC or FTC number with the intent to use to defraud, or to sell, or to transfer the FTC or FTC number to another person with the knowledge that it is to be used to defraud;

(2) To acquire an FTC or FTC number that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the card holder, and to retain possession with the intent to use to defraud or to sell or transfer to another person with the knowledge that it is to be used to defraud. [I.C., § 18-3125, as added by 1981, ch. 164, § 4, p. 288; am. 2002, ch. 72, § 2, p. 158.]

Compiler's notes. Section 3 of S.L. 2002, ch. 72 is compiled as § 18-3128.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-3125A. Unauthorized factoring of credit card sales drafts. — It is unlawful for any person to knowingly and with intent to defraud, employ, solicit or otherwise cause an authorized credit card merchant, or for the authorized credit card merchant itself, to present to the issuer for payment any credit card sales draft pertaining to any sale or purported sale of goods or services which was not made by such authorized credit card merchant in the ordinary course of business, except with the express authorization of the issuer. [I.C., § 18-3125A, as added by 1991, ch. 331, § 4, p. 856.]

Sec. to sec. ref. This section is referred to in §§ 18-3127 and 18-3128.

18-3126. Misappropriation of personal identifying information.

— It is unlawful for any person to obtain or record personal identifying information of another person without the authorization of that person, with the intent that the information be used to obtain, or attempt to obtain, credit, money, goods or services in the name of the other person without the consent of that person. [I.C., § 18-3126, as added by 1999, ch. 124, § 3, p. 361.]

Compiler's notes. Former § 18-3126 was amended and redesignated as § 18-3127 by § 4 of S.L. 1999, ch. 124.

Section 2 of S.L. 1999, ch. 124 is compiled as § 18-3124.

Sec. to sec. ref. This section is referred to in §§ 18-3127, 18-3128, 18-7803 and 28-51-102.

18-3127. Receiving or possessing fraudulently obtained goods or services.

— It is unlawful for any person to receive, retain, conceal, possess or dispose of personal property, cash or other representative of value, who knows or has reason to believe the property, cash or other representative of value has been obtained by fraud as set forth in sections 18-3123, 18-3124, 18-3125A and 18-3126, Idaho Code. [I.C., § 18-3126, as added by 1981, ch. 164, § 5, p. 288; am. 1991, ch. 331, § 5, p. 856; am. and redesign. 1999, ch. 124, § 4, p. 361.]

Compiler's notes. This section was formerly compiled as § 18-3126.

Former § 18-3127 was amended and redesignated as § 18-3128 by § 5 of S.L. 1999, ch. 124.

Sec. to sec. ref. This section is referred to in § 18-3128.

18-3128. Penalty for violation. — (1) Any person found guilty of a violation of section 18-3124, 18-3125A, 18-3126 or 18-3127, Idaho Code, is guilty of a misdemeanor. In the event that the retail value of the goods obtained or attempted to be obtained through any violation of the provisions of section 18-3124, 18-3125A, 18-3126 or 18-3127, Idaho Code, exceeds three hundred dollars (\$300), any such violation will constitute a felony, and will be punished as provided in this section.

(2) For purposes of this section, the punishment for a misdemeanor shall be a fine of up to one thousand dollars (\$1,000) or up to one (1) year in the county jail, or both such fine and imprisonment.

(3) For purposes of this section, the punishment for a felony shall be a fine of up to fifty thousand dollars (\$50,000) or imprisonment in the state prison not exceeding five (5) years, or both such fine and imprisonment. [I.C., § 18-3127, as added by 1981, ch. 164, § 6, p. 288; am. 1982, ch. 100, § 1, p. 279; am. 1991, ch. 331, § 6, p. 856; am. 1994, ch. 132, § 3, p. 301; am. and redesign. 1999, ch. 124, § 5, p. 361; am. 2002, ch. 72, § 3, p. 158.]

Compiler's notes. This section was formerly compiled as § 18-3127.

Section 7 of S.L. 1981, ch. 164 contained a repeal.

Section 2 of S.L. 1994, ch. 132 is compiled as § 18-2407.

Section 2 of S.L. 2002, ch. 72 is compiled as § 18-3125.

Sentence.

The district court imposed a sentence which was more severe than the period of confine-

ment recommended by the state for the conviction of fraudulent use of a financial transaction card, apparently convinced that the modest sentences imposed on the defendant in the past had not deterred his criminal

behavior and that there was a need to protect society from this continued conduct, in light of the sentencing criteria, the sentence of five years was reasonable. *State v. Morris*, 120 Idaho 571, 817 P.2d 1095 (Ct. App. 1991).

CHAPTER 32

FALSIFYING, MUTILATING OR CONCEALING PUBLIC RECORDS OR WRITTEN INSTRUMENTS

SECTION.

- 18-3201. Officer stealing, mutilating or falsifying public records.
 18-3202. Private person stealing, mutilating or falsifying public records.
 18-3203. Offering false or forged instrument for record.

SECTION.

- 18-3204. False certificates or other instruments from officers.
 18-3205. Destroying legal notices.
 18-3206. Mutilating written instruments.

18-3201. Officer stealing, mutilating or falsifying public records.

— Any public officer, law enforcement officer, or subordinate thereof, who wilfully destroys, alters, falsifies or commits the theft of the whole or any part of any police report or any record kept as part of the official governmental records of the state or any county or municipality in the state, shall be guilty of a felony and is punishable by imprisonment in the state prison for not more than fourteen (14) years. [I.C., § 18-3201, as added by 1972, ch. 336, § 1, p. 844; am. 1982, ch. 367, § 1, p. 918.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 95; R.S., R.C., & C.L., § 6464; C.S., § 8155; I.C.A., § 17-901 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Mutilations, al-

terations, and deletions as affecting admissibility in evidence of public records. 28 A.L.R.2d 1443.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense. 75 A.L.R.4th 1067.

18-3202. Private person stealing, mutilating or falsifying public records. — Every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding five (5) years, or in a county jail not exceeding one (1) year, or by a fine not exceeding \$100.00, or by both. [I.C., § 18-3202, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 95; R.S., R.C., & C.L., § 6465; C.S., § 8156; I.C.A., § 17-902 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3203. Offering false or forged instrument for record. — Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of a felony. [I.C., § 18-3203, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6466; C.S., § 8157; I.C.A., § 17-903 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-3204. False certificates or other instruments from officers. —

Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor. [I.C., § 18-3204, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6530; C.S., § 8198; I.C.A., § 17-1021 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: Christensen v. Hollingsworth, 6 Idaho 94, 53 P. 271 (1898).

18-3205. Destroying legal notices. — Every person who intentionally defaces, obliterates, tears down or destroys any copy or transcript, or extract from or of any law of the United States or of this state, or any proclamation, advertisement or notification set up at any place in this state, by authority of any law of the United States or of this state, or by order of any court, before the expiration of the time for which the same was to remain set up, is guilty of a misdemeanor. [I.C., § 18-3205, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 13, p. 296.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 132; R.S., R.C., & C.L., § 7164; C.S., § 8565; I.C.A., § 17-4315 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,* 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 12 of S.L. 1994, ch. 131 contained a repeal and § 14 is compiled as § 18-3308.

18-3206. Mutilating written instruments. — A person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison for not less than one (1) nor more than five (5) years. [I.C., § 18-3206, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 72; R.S., R.C., & C.L., § 7165; C.S., § 8566; I.C.A., § 17-4316 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

CHAPTER 33

FIREARMS, EXPLOSIVES AND OTHER DEADLY WEAPONS

SECTION.

18-3301. Deadly weapon — Possession with intent to assault.

18-3302. Issuance of licenses to carry concealed weapons.

SECTION.

18-3302A. Sale of weapons to minors.

18-3302B. Carrying concealed weapons under the influence of alcohol or drugs.

SECTION.

- 18-3302C. Prohibited conduct.
- 18-3302D. Possessing weapons or firearms on school property.
- 18-3302E. Possession of a weapon by a minor.
- 18-3302F. Prohibition of possession of certain weapons by a minor.
- 18-3302G. Exceptions.
- 18-3303. Exhibition or use of deadly weapon.
- 18-3304. Aiming firearms at others.
- 18-3305. Discharge of arms aimed at another.
- 18-3306. Injuring another by discharge of aimed firearms.
- 18-3307. Civil liability for injury by firearm.
- 18-3308. Selling explosives, ammunition or firearms to minors.
- 18-3309. [Repealed.]
- 18-3310. Shipping loaded firearms.
- 18-3311. Keeping gunpowder or other explosives in towns.
- 18-3312. Injuring another by careless handling and discharge of firearms.
- 18-3313. False reports of explosives in public

SECTION.

- or private places a felony — Penalty.
- 18-3314. Resident's purchase of firearm in contiguous state.
- 18-3315. Resident of contiguous state — Purchase of firearm in Idaho.
- 18-3316. Unlawful possession of a firearm.
- 18-3317. Unlawful discharge of a firearm at a dwelling house, occupied building, vehicle or mobile home.
- 18-3318. Definitions.
- 18-3319. Unlawful possession of bombs or destructive devices.
- 18-3320. Unlawful use of destructive device or bomb.
- 18-3320A. Disposal of destructive devices or bombs.
- 18-3321. Persons exempt.
- 18-3322. Use of weapons of mass destruction — Definition.
- 18-3323. Biological weapons — Definitions.
- 18-3324. Use of chemical weapons — Definitions.

18-3301. Deadly weapon — Possession with intent to assault. — Every person having upon him any deadly weapon with intent to assault another is guilty of a misdemeanor. [I.C., § 18-3301, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 133; R.S., R.C., & C.L., § 7023; C.S., § 8406; I.C.A., § 17-3101 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. 79 Am. Jur. 2d, Weapons and Firearms, § 1 et seq.

94 C.J.S., Weapons, § 1 et seq.

Liability for injury by explosive or the like found by, or left accessible to, a child. 10 A.L.R.2d 22.

Manufacturer or wholesaler, liability for injury caused by a third person's use of explosives or other dangerous articles sold to re-

tailer in violation of law. 11 A.L.R.2d 1028.

Criminal offense of bomb hoax or making false report as to planting of explosive. 93 A.L.R.2d 304.

Validity and construction of gun control laws. 28 A.L.R.3d 845; 86 A.L.R.4th 931.

Possession of bomb, Molotov cocktail, or similar device as criminal offense. 42 A.L.R.3d 1230.

Who is entitled to permit to carry concealed weapons. 51 A.L.R.3d 504.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 A.L.R.3d 825.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

18-3302. Issuance of licenses to carry concealed weapons. — (1) The sheriff of a county shall, within ninety (90) days after the filing of an application by any person who is not disqualified from possessing or receiving a firearm under state or federal law, issue a license to the person to carry a weapon concealed on his person within this state for four (4) years

from the date of issue. The citizen's constitutional right to bear arms shall not be denied to him, unless he:

- (a) Is ineligible to own, possess or receive a firearm under the provisions of state or federal law; or
- (b) Is formally charged with a crime punishable by imprisonment for a term exceeding one (1) year; or
- (c) Has been adjudicated guilty in any court of a crime punishable by imprisonment for a term exceeding one (1) year; or
- (d) Is a fugitive from justice; or
- (e) Is an unlawful user of, or addicted to, marijuana or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. 802; or
- (f) Is currently suffering or has been adjudicated as follows, based on substantial evidence:
 - (i) Lacking mental capacity as defined in section 18-210, Idaho Code; or
 - (ii) Mentally ill as defined in section 66-317, Idaho Code; or
 - (iii) Gravely disabled as defined in section 66-317, Idaho Code; or
 - (iv) An incapacitated person as defined in section 15-5-101(a), Idaho Code; or
- (g) Is or has been discharged from the armed forces under dishonorable conditions; or
- (h) Is or has been adjudicated guilty of or received a withheld judgment or suspended sentence for one (1) or more crimes of violence constituting a misdemeanor, unless three (3) years has elapsed since disposition or pardon has occurred prior to the date on which the application is submitted; or
- (i) Has had entry of a withheld judgment for a criminal offense which would disqualify him from obtaining a concealed weapon license; or
- (j) Is an alien illegally in the United States; or
- (k) Is a person who having been a citizen of the United States, has renounced his or her citizenship; or
- (l) Is under twenty-one (21) years of age; or
- (m) Is free on bond or personal recognizance pending trial, appeal or sentencing for a crime which would disqualify him from obtaining a concealed weapon license; or
- (n) Is subject to a protection order issued under chapter 63, title 39, Idaho Code, that restrains the person from harassing, stalking or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.

The license application shall be in triplicate, in a form to be prescribed by the director of the Idaho state police, and shall ask the name, address, description and signature of the licensee, date of birth, social security number, military status, and the driver's license number or state identification card number of the licensee if used for identification in applying for the license. The application shall indicate that provision of the social security number is optional. The license application shall contain a warning substantially as follows:

CAUTION: Federal law and state law on the possession of weapons and

firearms differ. If you are prohibited by federal law from possessing a weapon or a firearm, you may be prosecuted in federal court. A state permit is not a defense to a federal prosecution.

The sheriff shall require any person who is applying for original issuance of a license to submit his fingerprints in addition to the other information required in this subsection. Within five (5) days after the filing of an application, the sheriff shall forward the application and fingerprints to the Idaho state police for a records check of state and national files. The Idaho state police shall conduct a national fingerprint-based records check and return the results to the sheriff within seventy-five (75) days. The sheriff shall not issue a license before receiving the results of the records check and must deny a license if the applicant is disqualified under any of the criteria listed in paragraphs (a) through (n) of subsection (1) of this section.

The license will be in a form substantially similar to that of the Idaho driver's license. It will bear the signature, name, address, date of birth, picture of the licensee, expiration date and the driver's license number or state identification card number of the licensee if used for identification in applying for the license. Upon issuing a license under the provisions of this section, the sheriff will notify the Idaho state police on a form or in a manner prescribed by the state police. Information relating to an applicant or licensee received or maintained pursuant to this section by the sheriff or Idaho state police is confidential and exempt from disclosure under section 9-338, Idaho Code.

(2) The fee for original issuance of a four (4) year license shall be twenty dollars (\$20.00) paid to the sheriff for the purpose of enforcing the provisions of this chapter. The sheriff may collect any additional fees necessary to cover the cost of processing fingerprints lawfully required by any state or federal agency or department, and the cost of materials for the license lawfully required by any state agency or department, which costs shall be paid to the state.

(3) The fee for renewal of the license shall be twelve dollars (\$12.00). The sheriff may collect any additional fees necessary to cover the processing costs lawfully required by any state or federal agency or department, and the cost of materials for the license lawfully required by any state agency or department, which costs shall be paid to the state. If a licensee applying for renewal has not previously been required to submit fingerprints, the sheriff shall require the licensee to do so and may collect any additional fees necessary to cover the cost of processing fingerprints lawfully required by any state or federal agency or department.

(4) A licensee may renew a license if the licensee applies for renewal at any time before or within ninety (90) days after the expiration date of the license. The sheriff shall require the licensee applying for renewal to complete an application. The sheriff shall submit the application to the Idaho state police for a records check of state and national databases. The Idaho state police shall conduct the records check and return the results to the sheriff within thirty (30) days. The sheriff shall not issue a renewal before receiving the results of the records check and must deny a license if

the applicant is disqualified under any of the criteria listed in subsection (1), paragraphs (a) through (n) of this section. A renewal license shall be valid for a period of four (4) years. A license so renewed shall take effect on the expiration date of the prior license. A licensee renewing after the expiration date of the license shall pay a late renewal penalty of ten dollars (\$10.00) in addition to the renewal fee. The fee shall be paid to the sheriff for the purpose of enforcing the provisions of this chapter.

(5) Notwithstanding the requirements of this section, the sheriff of the county of the applicant's residence may issue a temporary emergency license for good cause pending review under subsection (1) of this section.

(6) A city, county or other political subdivision of this state shall not modify the requirements of this section, nor may a political subdivision ask the applicant to voluntarily submit any information not required in this section. A civil action may be brought to enjoin a wrongful refusal to issue a license or a wrongful modification of the requirements of this section. The civil action may be brought in the county in which the application was made or in Ada county at the discretion of the petitioner. Any person who prevails against a public agency in any action in the courts for a violation of subsections (1) through (5) of this section, shall be awarded costs, including reasonable attorney's fees incurred in connection with the legal action.

(7) Except in the person's place of abode or fixed place of business, a person shall not carry a concealed weapon without a license to carry a concealed weapon. For the purposes of this section, a concealed weapon means any dirk, dirk knife, bowie knife, dagger, pistol, revolver, or any other deadly or dangerous weapon. The provisions of this section shall not apply to any lawfully possessed shotgun or rifle.

(8) A county sheriff, deputy sheriff, or county employee who issues a license to carry a concealed weapon under this section shall not incur any civil or criminal liability as the result of the performance of his duties under this section.

(9) While in any motor vehicle, inside the limits or confines of any city or inside any mining, lumbering, logging or railroad camp a person shall not carry a concealed weapon on or about his person without a license to carry a concealed weapon. This shall not apply to any pistol or revolver located in plain view whether it is loaded or unloaded. A firearm may be concealed legally in a motor vehicle so long as the weapon is disassembled or unloaded.

(10) In implementing the provisions of this section, the sheriff shall make applications readily available at the office of the sheriff or at other public offices in his jurisdiction.

(11) The sheriff of a county may issue a license to carry a concealed weapon to those individuals between the ages of eighteen (18) and twenty-one (21) years who in the judgment of the sheriff warrants the issuance of the license to carry a concealed weapon. Such issuance shall be subject to limitations which the issuing authority deems appropriate. Licenses issued to individuals between the ages of eighteen (18) and twenty-one (21) shall be easily distinguishable from regular licenses.

(12) The requirement to secure a license to carry a concealed weapon under this section shall not apply to the following persons:

(a) Officials of a county, city, state of Idaho, the United States, peace officers, guards of any jail, court appointed attendants or any officer of any express company on duty;

(b) Employees of the adjutant general and military division of the state where military membership is a condition of employment when on duty;

(c) Criminal investigators of the attorney general's office, criminal investigators of a prosecuting attorney's office, prosecutors and their deputies;

(d) Any person outside the limits of or confines of any city, or outside any mining, lumbering, logging or railroad camp, located outside any city, while engaged in lawful hunting, fishing, trapping or other lawful outdoor activity;

(e) Any publicly elected Idaho official;

(f) Retired peace officers with at least ten (10) years of service with the state or a political subdivision as a peace officer and who have been certified by the peace officer standards and training council;

(g) Any person who has a valid permit from a state or local law enforcement agency or court authorizing him to carry a concealed weapon. A permit issued in another state will only be considered valid if the permit is in the licensee's physical possession.

(13) When issuing a license pursuant to this section, the sheriff may require the applicant to demonstrate familiarity with a firearm by any of the following, provided the applicant may select which one:

(a) Completion of any hunter education or hunter safety course approved by the department of fish and game or a similar agency of another state; or

(b) Completion of any national rifle association firearms safety or training course, or any national rifle association hunter education course; or

(c) Completion of any firearms safety or training course or class available to the general public offered by a law enforcement agency, community college, college, university, or private or public institution or organization or firearms training school, utilizing instructors certified by the national rifle association or the Idaho state police; or

(d) Completion of any law enforcement firearms safety or training course or class offered for security guards, investigators, special deputies, or any division or subdivision of a law enforcement agency or security enforcement agency; or

(e) Presents evidence or equivalent experience with a firearm through participation in organized shooting competition or military service; or

(f) Is licensed or has been licensed to carry a firearm in this state or a county or municipality, unless the license has been revoked for cause; or

(g) Completion of any firearms training or training or safety course or class conducted by a state certified or national rifle association certified firearms instructor.

(14) A person carrying a concealed weapon in violation of the provisions of this section shall be guilty of a misdemeanor.

(15) The sheriff of the county where the license was issued or the sheriff of the county where the person resides shall have the power to revoke a license subsequent to a hearing in accordance with the provisions of chapter 52, title 67, Idaho Code, for any of the following reasons:

- (a) Fraud or intentional misrepresentation in the obtaining of a license; or
- (b) Misuse of a license, including lending or giving a license to another person, or duplicating a license, or using a license with the intent to unlawfully cause harm to a person or property; or
- (c) The doing of an act or existence of a condition which would have been grounds for the denial of the license by the sheriff; or
- (d) The violation of any of the terms of this section; or
- (e) The applicant is adjudicated guilty of or receives a withheld judgment for a crime which would have disqualified him from initially receiving a license.

(16) A person twenty-one (21) years of age or older issued a license to carry a concealed weapon or a license renewal on or after July 1, 1995, is exempt from any requirement to undergo a records check at the time of purchase or transfer of a firearm from a federally licensed firearms dealer. However, a temporary emergency license issued under subsection (5) of this section shall not exempt the holder of the license from any records check requirement. Temporary emergency licenses shall be easily distinguishable from regular licenses.

(17) The provisions of this section are hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this section. [I.C., § 18-3302, as added by 1990, ch. 256, § 2, p. 732; am. 1991, ch. 213, § 1, p. 507; am. 1991, ch. 262, § 1, p. 647; am. 1994, ch. 431, § 1, p. 1392; am. 1995, ch. 356, § 1, p. 1201; am. 1996, ch. 392, § 1, p. 1316; am. 1998, ch. 90, § 8, p. 315; am. 2000, ch. 469, § 22, p. 1450.]

Compiler's notes. *Former § 18-3302, which comprised I.C., § 18-3302, as added by 1972, ch. 336, § 1, p. 844; am. 1988, ch. 229, § 2, p. 441, was repealed by S.L. 1990, ch. 256, § 1.

Another former section, which comprised S.L. 1909, p. 6, § 1; S.L. 1917, ch. 146, § 1, p. 461; reen. C.L., § 7024; C.S., § 8407; I.C.A., § 17-3102 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Sections 1 and 3 of S.L. 1988, ch. 229 are compiled as §§ 1-907 and 31-2215.

Section 2 of S.L. 1991, ch. 262 is compiled as § 18-3302C.

Section 2 of S.L. 1995, ch. 356 was compiled as § 9-340. Section 9-340 was repealed by section 1 of S.L. 1999, ch. 30.

Section 7 of S.L. 1998, ch. 90 is compiled as § 18-211.

Sections 21 and 23 of S.L. 2000, ch. 469 are compiled as §§ 18-915 and 18-4508, respectively.

Section 2 of S.L. 1991, ch. 213 declared an emergency. Approved April 2, 1991.

Section 9 of S.L. 1998, ch. 90 provided that this act shall be in full force and effect on and after July 1, 1999.

Cross ref. Assault with deadly weapon, § 18-906.

Confiscation of firearms found at time of arrest, § 19-3807.

Possession of burglarious instruments, § 18-1406.

Sec. to sec. ref. This section is referred to in §§ 9-340B, 18-3302C and 19-5403.

Cited in: State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

ANALYSIS

Burden of proof.

Carrying weapon.

Carrying weapon about person.

Concealment.

—Probable cause.

Defective judgment.

Evidence.

Instructions.

Right to bear arms.

Burden of Proof.

The phrase “without a license to carry a concealed weapon,” is an integral part of the conduct proscribed by subsections (7) and (9) of this section and, it is so incorporated into

the description of the offense as to be a material element of the crime; therefore, the State bears the burden of proving that a person charged with violating this section is not licensed to carry a concealed weapon. *State v. Morales*, 127 Idaho 951, 908 P.2d 1258 (Ct. App. 1996).

A gun's assembly is not an element of the offense of carrying a concealed weapon without a license which must be proved by the state; it was unnecessary to determine whether removal of firing pin constituted disassembly. *State v. Haley*, 129 Idaho 333, 924 P.2d 234 (Ct. App. 1996).

Carrying Weapon.

Where officer observed defendant, convicted of carrying a concealed weapon without a license, in his pickup and later found a loaded weapon in the cab of his pickup, it was in close proximity and readily accessible for prompt use; fact that defendant exited pickup when officer arrived did not remove defendant from purview of the statute. *State v. Haley*, 129 Idaho 333, 924 P.2d 234 (Ct. App. 1996).

Carrying Weapon About Person.

One carries a weapon "upon or about his person" not only when he physically is carrying it in his clothing or in a handbag of some sort, but also when he goes about with the weapon in such close proximity to himself that it is readily accessible for prompt use. *State v. McNary*, 100 Idaho 244, 596 P.2d 417 (1979).

Concealment.

Defendant was not justified in carrying concealed weapon in violation of city ordinance even though he had received threatening calls and the sheriff was not available so as to enable defendant to obtain a permit for such weapon. *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945).

The general test of concealment is whether a weapon is so carried as not to be discernible by ordinary observation. *State v. McNary*, 100 Idaho 244, 596 P.2d 417 (1979).

Under Idaho law, a weapon is concealed if not discernible by ordinary observation. *United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983).

Where an officer could only see a small portion of a weapon in the defendant's car from one particular vantage point, the weapon was not discernible from ordinary observation, and defendant was properly arrested for carrying a concealed weapon. *State v. Button*, 136 Idaho 526, 37 P.3d 23 (Ct. App. 2001).

—Probable Cause.

Where a police officer, in checking a car parked near an intersection partially in the traffic lane with its lights on, observed about

eight inches of an altered gun stock protruding from under the front seat next to the driver's right leg, the officer had probable cause to believe that the concealed weapons law was being violated. *United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983).

Where officer observed altered gun stock protruding from under front seat of defendant's car, he had probable cause to believe this section was being violated and seizure of the gun was the result of a lawful search incident to arrest. *United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983).

Defendant's arrest was lawful where the facts showed that the police officer had probable cause to believe defendant was unlawfully carrying a concealed weapon; the knife was not discernible by ordinary observation where the positioning of the knife between the seat and the console of the car concealed it from casual observation. *State v. Veneroso*, 138 Idaho 925, 71 P.3d 1072 (Ct. App. 2003).

Defective Judgment.

When judgment of assault with deadly weapon was not authorized by verdict, but all proceedings up to that time were regular, judgment may be reversed with directions to trial court to pronounce judgment in conformity with verdict. *State v. Roby*, 43 Idaho 724, 254 P. 210 (1927).

Evidence.

Where at the time that the state offered the 9 mm. pistol into evidence the state had laid an adequate foundation to show that the 9 mm. pistol, located inside the zippered case, had been removed by the defendant from underneath the seat of his car and carried by him as he attempted to avoid being arrested, it was not necessary that every element of the crime be established prior to admission of the exhibit into evidence. *State v. McNary*, 100 Idaho 244, 596 P.2d 417 (1979).

Instructions.

Instruction as to right to bear arms not in harmony with this section was properly refused. *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932).

Right to Bear Arms.

The right to bear arms may not be denied by the legislature; it only has the power to "regulate the exercise of this right"; that is, among other things, it may prohibit carrying concealed weapons, or prescribe the kind or character of arms that may or may not be kept, carried, or used, and various other things of a regulatory character. *State v. Woodward*, 58 Idaho 385, 74 P.2d 92, 114 A.L.R. 627 (1937).

The right to prohibit carrying of concealed

weapons falls within the police power of a municipality and an ordinance enforcing same is constitutional. *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945).

Opinions of Attorney General. This section is unconstitutional because it will force a person of common intelligence to guess as to whether or not he or she will be in violation of the law. Further, it is unconstitutional because it does not provide proper standards for the persons charged with applying the statute, in some cases forcing them to guess at its meaning, and in other cases granting them unfettered discretion as to its implementation. OAG 90-3.

The language in subdivision (1) of this section, implying that one has a constitutional right to carry concealed weapons, is without foundation in the context it is used. OAG 90-3.

It appears that the legislature intended (despite its confusing use of the phrase "right to bear arms") that anyone who has ever been convicted of a crime with a penalty exceeding one year will not be eligible to receive a concealed weapon license. OAG 90-3.

Subsection (1)(h) of this section states that a license may be denied where a person has been prosecuted for a misdemeanor "crime of violence" within three years of the application, and the term "violence" has been defined as strength or energy actively displayed or exerted, vehement or forcible action, or an unjust exercise of force; while such misdemeanors as assault and battery clearly meet this definition, it is entirely unclear whether the legislature intended to include such crimes as resisting arrest, disturbing the peace (which includes such acts as quarreling and fighting), false imprisonment, discharge of an aimed firearm, injuring another by the careless use of a firearm, riotous conduct near an election place, negligent vehicular man-

slaughter, or any other "nonproperty crime" misdemeanor. OAG 90-3.

A statute that forbids or requires the doing of an act in terms so vague that persons must necessarily differ as to its application violates the first essential of due process of law. In the final analysis, this section produces this result in areas such as who may apply for a license, who may be denied a license, who is exempt from licensure, how a license may be revoked, and whether a license may be revoked. When these vague portions of the statute are severed from the rest, what remains is a meaningless series of exceptions and subparts having no independent value. OAG 90-3.

Collateral References. Firearm used as bludgeon as a deadly weapon. 8 A.L.R. 1319.

Cane as a deadly weapon. 30 A.L.R. 815.

Offense of carrying concealed weapons as affected by manner of carrying or place of concealment. 43 A.L.R. 492; 159 A.L.R. 319.

Offense of carrying weapon on person as affected by place where defendant was at the time. 73 A.L.R. 839.

Tear gas gun as dangerous or deadly weapon. 92 A.L.R. 1098.

Liability of seller of firearms, explosive, or highly inflammable substance to child. 20 A.L.R.2d 119; 75 A.L.R.3d 825; 95 A.L.R.3d 390; 4 A.L.R.4th 331.

Scope and effect of exception in statute forbidding carrying of weapons, as to person on his own premises. 57 A.L.R.3d 938.

Validity of state statutes restricting the right of aliens to bear arms. 28 A.L.R.4th 1096.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 19 A.L.R.5th 823.

18-3302A. Sale of weapons to minors. — It shall be unlawful to directly or indirectly sell to any minor under the age of eighteen (18) years any weapon without the written consent of the parent or guardian of the minor. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine not in excess of one thousand dollars (\$1,000), by imprisonment in the county jail for a term not in excess of six (6) months, or by both such fine and imprisonment. As used in this section, "weapon" shall mean any dirk, dirk knife, bowie knife, dagger, pistol, revolver or gun. [I.C., § 18-3302A, as added by 1990, ch. 256, § 3, p. 732; am. 1994, ch. 369, § 1, p. 1186.]

Compiler's notes. Section 2 of S.L. 1994, ch. 369 is compiled as § 18-3302E.

Sec. to sec. ref. This section is referred to in § 18-3302E.

ANALYSIS

Parent's consent.

Purchase by intermediary.

Parent's Consent.

Nothing in this section, the case law, or the rules of statutory construction suggests that a parent can either (1) render an unlawful straw man purchase legal by consenting to it, or (2) override the clear prohibition against making material false statements in a firearms transaction. *United States v. Moore*, 109

F.3d 1456 (9th Cir.), cert. denied, 522 U.S. 836, 118 S. Ct. 108, 139 L. Ed. 2d 61 (1997).

Purchase By Intermediary.

The fact that Idaho law permits a weapons transfer to a minor under 16 years of age with parental consent does not "empower" a juvenile to purchase a firearm from a federal dealer through an intermediary who falsely identifies himself as the buyer. *United States v. Moore*, 109 F.3d 1456 (9th Cir.), cert. denied, 522 U.S. 836, 118 S. Ct. 108, 139 L. Ed. 2d 61 (1997).

18-3302B. Carrying concealed weapons under the influence of alcohol or drugs. — It shall be unlawful for any person to carry a concealed weapon on or about his person when intoxicated or under the influence of an intoxicating drink or drug. Any violation of the provisions of this section shall be a misdemeanor. [I.C., § 18-3302B, as added by 1990, ch. 256, § 3, p. 732.]

18-3302C. Prohibited conduct. — Any person obtaining a license under the provisions of section 18-3302, Idaho Code, shall not:

(1) Carry a concealed weapon in a courthouse, juvenile detention facility or jail, public or private school, except as provided in subsection (4)(f) of section 18-3302D, Idaho Code; or

(2) Provide information on the application for a permit to carry a concealed weapon knowing the same to be untrue. Any person violating the provisions of this section shall be guilty of a misdemeanor. [I.C., § 18-3302C, as added by 1990, ch. 256, § 3, p. 732; am. 1991, ch. 262, § 2, p. 647; am. 2000, ch. 420, § 2, p. 1366.]

Compiler's notes. Section 1 of S.L. 1991, ch. 262 is compiled as § 18-3302.

18-3302D. Possessing weapons or firearms on school property. —

(1)(a) It shall be unlawful and is a misdemeanor for any person to possess a firearm or other deadly or dangerous weapon while on the property of a school or in those portions of any building, stadium or other structure on school grounds which, at the time of the violation, were being used for an activity sponsored by or through a school in this state or while riding school provided transportation.

(b) The provisions of this section regarding the possession of a firearm or other deadly or dangerous weapon on school property shall also apply to students of schools while attending or participating in any school sponsored activity, program or event regardless of location.

(2) Definitions. As used in this section:

(a) "Deadly or dangerous weapon" means any weapon as defined in 18 U.S.C. section 930;

(b) "Firearm" means any firearm as defined in 18 U.S.C. section 921;

(c) "Minor" means a person under the age of eighteen (18) years;

(d) "Possess" means to bring an object, or to cause it to be brought, onto the property of a public or private elementary or secondary school, or onto

a vehicle being used for school provided transportation, or to exercise dominion and control over an object located anywhere on such property or vehicle. For purposes of subsection (1)(b) of this section, “possess” shall also mean to bring an object onto the site of a school sponsored activity, program or event, regardless of location, or to exercise dominion and control over an object located anywhere on such a site;

(e) “School” means a private or public elementary or secondary school.

(3) Right to search students or minors. For purposes of enforcing the provisions of this section, employees of a school district shall have the right to search all students or minors, including their belongings and lockers, that are reasonably believed to be in violation of the provisions of this section, or applicable school rule or district policy, regarding the possessing of a firearm or other deadly or dangerous weapon.

(4) The provisions of this section shall not apply to the following persons:

(a) A peace officer;

(b) A person who lawfully possesses a firearm or deadly or dangerous weapon as an appropriate part of a program, an event, activity or other circumstance approved by the board of trustees or governing board;

(c) A person or persons complying with the provisions of section 19-202A, Idaho Code;

(d) Any adult over eighteen (18) years of age and not enrolled in a public or private elementary or secondary school who has lawful possession of a firearm or other deadly or dangerous weapon, secured and locked in his vehicle in an unobtrusive, nonthreatening manner;

(e) A person who lawfully possesses a firearm or other deadly or dangerous weapon in a private vehicle while delivering minor children, students or school employees to and from school or a school activity;

(f) Notwithstanding the provisions of section 18-3302C, Idaho Code, a person or an employee of the school or school district who is authorized to carry a firearm with the permission of the board of trustees of the school district or the governing board.

(5) Penalties. Persons who are found guilty of violating the provisions of this section may be sentenced to a jail term of not more than one (1) year or fined an amount not in excess of one thousand dollars (\$1,000) or both. If a violator is a student and under the age of eighteen (18) years, the court may place the violator on probation and suspend the juvenile detention or fine or both as long as the violator is enrolled in a program of study recognized by the court that, upon successful completion, will grant the violator a general equivalency diploma (GED) or a high school diploma or other educational program authorized by the court. Upon successful completion of the terms imposed by the court, the court shall discharge the offender from serving the remainder of the sentence. If the violator does not complete, is suspended from, or otherwise withdraws from the program of study imposed by the court, the court, upon receiving such information, shall order the violator to commence serving the sentence provided for in this section. [I.C., § 18-3302D, as added by 1993, ch. 153, § 1, p. 388; am. 1995, ch. 248, § 1, p. 819; am. 2000, ch. 420, § 1, p. 1366.]

Compiler's notes. Section 2 of S.L. 1995, ch. 248 is compiled as § 33-205.

Section 2 of S.L. 1993, ch. 153 declared an emergency. Approved March 25, 1993.

Construction With Other Law.

A writ of mandamus was improperly issued to students who had been expelled from school for having a pellet gun on school property in violation of the Gun Free Schools Act and district policy, where the students were

provided adequate notice, a hearing, and the school board acted within the scope of its discretion under § 33-205 in expelling the students. *Rogers v. Gooding Pub. Joint Sch. Dist.* No. 231, 135 Idaho 480, 20 P.3d 16 (2001).

Collateral References. What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

18-3302E. Possession of a weapon by a minor. — (1) It shall be unlawful for any person under the age of eighteen (18) years to possess or have in possession any weapon, as defined in section 18-3302A, Idaho Code, unless he:

(a) Has the written permission of his parent or guardian to possess the weapon; or

(b) Is accompanied by his parent or guardian while he has the weapon in his possession.

(2) Any minor under the age of twelve (12) years in possession of a weapon shall be accompanied by an adult.

(3) Any person who violates the provisions of this section is guilty of a misdemeanor. [I.C., § 18-3302E, as added by 1994, ch. 369, § 2, p. 1186.]

Compiler's notes. Section 1 of S.L. 1994, ch. 369 is compiled as § 18-3302A.

Collateral References. What constitutes

"constructive possession" of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

18-3302F. Prohibition of possession of certain weapons by a minor. — (1) It shall be unlawful for any person under the age of eighteen (18) years to possess or have in possession any handgun.

(2) Except as provided by federal law, a minor under the age of eighteen (18) years may not possess the following:

(a) A sawed-off rifle or sawed-off shotgun; or

(b) A full automatic weapon.

(3) Any person who violates the provisions of subsection (2)(a) of this section is guilty of a misdemeanor.

(4) Any person who violates the provisions of subsection (2)(b) of this section is guilty of a felony.

(5) For purposes of this section:

(a) "Full automatic weapon" means any firearm which fires, is designed to fire, or can be readily restored to fire, automatically more than one (1) bullet, or other missile without reloading, by a single function of the trigger.

(b) "Handgun" means a pistol, revolver, or other firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged, the length of the barrel of which, not including any revolving, detachable, or magazine breech, does not exceed twelve (12) inches. Excluded from this definition are handguns firing a metallic projectile, such as a BB or pellet, through the force of air pressure, CO₂ pressure, or spring action or any spot marker gun.

(6) Any person who provides a handgun to a minor when the possession of the handgun by the minor is a violation of the provisions of this section is guilty of a misdemeanor. [I.C., § 18-3302F, as added by 1994, ch. 369, § 3, p. 1186.]

Collateral References. What constitutes “constructive possession” of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

18-3302G. Exceptions. — The provisions of section 18-3302E, Idaho Code, regarding the possession of a weapon by a minor or section 18-3302F, Idaho Code, regarding possession of handguns by minors shall not apply to any of the following:

(1) Patrons firing at lawfully operated target concessions at amusement parks and similar locations provided that the firearms to be used are firmly chained or affixed to the counters;

(2) Any person in attendance at a hunter’s safety course or a firearm’s safety course;

(3) Any person engaging in practice or any other lawful use of a firearm at an established range or any other area where the discharge of a firearm is not prohibited by state or local law;

(4) Any person engaging in an organized competition involving the use of a firearm, or participating in or practicing for such competition;

(5) Any minor under eighteen (18) years of age who is on real property with the permission of the owner, licensee, or lessee of the property and who has the permission of a parent or legal guardian or the owner, licensee, or lessee to possess a firearm not otherwise in violation of the law;

(6) Any resident or nonresident hunters with a valid hunting license or other persons who are lawfully engaged in hunting; and

(7) Any person traveling to or from any activity described in subsection (2), (3), (4), (5) or (6) of this section with an unloaded firearm in his possession. [I.C., § 18-3302G, as added by 1994, ch. 369, § 4, p. 1186.]

18-3303. Exhibition or use of deadly weapon. — Every person who, not in necessary self-defense, in the presence of two (2) or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor. [I.C., § 18-3303, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised Cr. & P. 1864, § 40; R.S., R.C., & C.L., § 6961; C.S., § 8375; I.C.A., § 17-3103 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

ANALYSIS

Instructions.
Lesser included offenses.

Instructions.

In prosecution for aggravated assault, the trial court erred in refusing to give the exhibiting a deadly weapon instruction requested by the defendant, where the jury could have concluded that the defendant — not acting in self-defense — and in the presence of at least four witnesses exhibited his revolver in a rude, angry and threatening manner. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Trial court did not commit reversible error in refusing to give jury instruction on the

lesser included offense of exhibiting a dangerous weapon at trial of defendant convicted of felony aggravated assault; court gave an instruction on the intermediate offense of exhibiting a deadly weapon and jury did not find defendant guilty of the intermediate crime and thus there was no indication that the result would have been different had the omitted instruction been given. *State v. Croasdale*, 120 Idaho 18, 813 P.2d 357 (Ct. App. 1991).

Lesser Included Offenses.

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon,

aiming a firearm at others, and discharge of arms aimed at another were lesser included offenses which the district court was obligated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of § 19-2132(c). Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault (a lesser included offense than the one charged of assault with intent to commit a serious felony). *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

18-3304. Aiming firearms at others. — Any person who shall intentionally, without malice, point or aim any firearm at or toward any other person shall be guilty of a misdemeanor and shall be subject to a fine of not more than \$50.00 and not less than \$5.00. [I.C., § 18-3304, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1907, p. 29, § 1; reen. R.C. & C.L., § 6707; C.S., § 8235; I.C.A., § 17-1211 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

Lesser Included Offenses.

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon, aiming a firearm at others, and discharge of

arms aimed at another were lesser included offenses which the district court was obligated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of § 19-2132(c). Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault (a lesser included offense than the one charged of assault with intent to commit a serious felony). *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

18-3305. Discharge of arms aimed at another. — Any person who shall discharge, without injury to any person, any firearm, while intentionally, without malice, aimed at or toward any person, shall be guilty of a misdemeanor, and shall be liable to a fine of not less than \$100.00, or imprisonment in the county jail not to exceed six (6) months, or both, at the discretion of the court. [I.C., § 18-3305, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1907, p. 29, § 2; reen. R.C. & C.L., § 6708; C.S., § 8236; I.C.A., § 17-1212 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Lesser Included Offenses.

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon, aiming a firearm at others, and discharge of arms aimed at another were lesser included offenses which the district court was obli-

gated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of § 19-2132(c). Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault (a lesser included offense than the one charged of assault with intent to commit a serious felony). *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

Collateral References. Reduction by appellate court of punishment imposed by trial court for discharging firearms. 89 A.L.R. 303.

18-3306. Injuring another by discharge of aimed firearms. — Any person who shall maim or injure any other person by the discharge of any firearm pointed or aimed, intentionally but without malice, at any such person, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than \$50.00, or imprisonment in the county jail for a period of not more than one (1) year; and if death ensue from such wounding or maiming, such person so offending shall be deemed guilty of the crime of manslaughter. [I.C., § 18-3306, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1907, p. 29, § 3; reen. R.C., & C.L., § 6709; C.S., § 8237; I.C.A., § 17-1213 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for manslaughter, § 18-4007.

Cited in: State v. Silcox, 103 Idaho 438, 650 P.2d 625 (1982).

included offense of injuring another by discharge of an aimed firearm, and also gave the jury an "acquittal first" instruction, the jury's unanimous verdict convicting the defendant of aggravated battery foreclosed it from considering whether he was guilty of any lesser-included offenses, and any potential error in the district court's failure to give requested instructions on additional lesser-included offenses was harmless. State v. Trejo, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Lesser Included Offense.

Where the district court instructed the jury in an aggravated battery trial on the lesser

18-3307. Civil liability for injury by firearm. — Any party maimed or wounded by the discharge of any firearm aforesaid, or the heirs or representatives of any person who may be killed by such discharge, may have an action against the party offending, for damages, which shall be found by a jury, and such damages, when found, may in the discretion of the court before which such action is brought, be doubled. [I.C., § 18-3307, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1907, p. 29, § 4; reen. R.C., & C.L., § 6710; C.S., § 8238; I.C.A., § 17-1214 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3308. Selling explosives, ammunition or firearms to minors. — No person, firm, association or corporation shall sell or give to any minor under the age of sixteen (16) years any powder, commonly called gunpowder, of any description, or any dynamite or other explosive, or any shells or fixed ammunition of any kind, except shells loaded for use in shotguns and for use in rifles of twenty-two (22) caliber or smaller, or any firearms of any description, without the written consent of the parents or guardian of such minor first had and obtained. Any person, firm, association or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor. [I.C., § 18-3308, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 131, § 14, p. 296.]

Compiler's notes. A former section, which comprised S.L. 1913, ch. 177, §§ 1, 2, p. 553; reen. C.L., § 6930a; C.S., § 8357; I.C.A., § 17-2715; 1935, ch. 23, § 1, p. 40 was re-

pealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 13 of S.L. 1994, ch. 131 is compiled as § 18-3205 and § 15 contained a repeal.

Liability to Persons Injured.

Seller of ammunition in violation of this section is liable to parents of child killed in careless use of revolver in which it was used. *Carron v. Guido*, 54 Idaho 494, 33 P.2d 345 (1934).

Where plaintiff's thirteen-year-old son was injured by a pistol sold to him by defendant without plaintiff's knowledge or consent, whether the fact that plaintiff's wife and

mother of the boy learned of the boy's possession of the gun before the accident, but did not order it taken away, consenting that he keep it until his father could be consulted, constituted an intervening, efficient cause so as to deprive defendant's act of selling the pistol of being the proximate cause of the injury was a genuine issue of a material fact and it was error for the trial court to render summary judgment for defendant. *Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966).

18-3309. Selling firearms or ammunition to Indians. [Repealed.]

Compiler's notes. This section which comprised 1879, p. 31; R.S., R.C., & C.L., § 6930;

C.S., § 8356; I.C.A., § 17-2725 was repealed by S.L. 1949, ch. 10, § 1.

18-3310. Shipping loaded firearms. — Every person who ships, or causes to be shipped, or delivers or causes to be delivered, to any railroad, express or stage company, or to any other common carrier, for shipment as baggage or otherwise, any loaded pistol, revolver, rifle, shotgun or other firearm, is guilty of a misdemeanor. [I.C., § 18-3310, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 345, § 1; reen. R.C., & C.L., § 7219; C.S., § 8599; I.C.A., § 17-4610 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-3311. Keeping gunpowder or other explosives in towns. — Every person who makes or keeps gunpowder, nitroglycerin, or other highly explosive substance, within any city or town, or who carries the same through the streets thereof, in any quantity or manner prohibited by law, or by any ordinance of such city or town, is guilty of a misdemeanor. [I.C., § 18-3311, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6915; C.S., § 8344; I.C.A., § 17-2714 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-3312. Injuring another by careless handling and discharge of firearms. — Any person who handles, uses or operates any firearm in a careless, reckless or negligent manner, or without due caution and circumspection, whereby the same is fired or discharged and maims, wounds or injures any other person or persons, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$300, or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment. [I.C., § 18-3312, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1949, ch. 70, § 1, p. 45 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Rule to sec. ref. This section is referred to in M.C.R., Rule 13.

Cited in: State v. Nastoff, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

Homicide.

It was not error in a homicide case to refuse to instruct the jury on the offense defined by this section. State v. Chaffin, 92 Idaho 629, 448 P.2d 243 (1968), overruled on other grounds, State v. Broadhead, 120 Idaho 141, 814 P.2d 401 (1991).

18-3313. False reports of explosives in public or private places a felony — Penalty. — Any person who reports to any police officer, sheriff, employee of a fire department or fire service, prosecuting attorney, newspaper, radio station, television station, deputy sheriff, deputy prosecuting attorney, member of the state police, employee of an airline, employee of an airport, employee of a railroad or bus line, an employee of a telephone company, occupants of a building, employee of a school district, or a news reporter in the employ of a newspaper or radio or television station, that a bomb or other explosive has been placed or secreted in a public or private place knowing that such report is false, is guilty of a felony, and upon conviction thereof, shall be sentenced to a term of not to exceed five (5) years in the state penitentiary. [I.C., § 18-3313, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1965, ch. 297, § 1, p. 787 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Imposition of state or local penalties for threatening to use

explosive devices at schools or other buildings. 79 A.L.R.5th 1.

Validity, construction, and application of 18 U.S.C.A. § 844(e), prohibiting use of mail, telephone, telegraph, or other instrument of commerce to convey bomb threat. 160 A.L.R. Fed. 625.

18-3314. Resident's purchase of firearm in contiguous state. — Residents of the state of Idaho may purchase rifles and shotguns in a state contiguous to Idaho, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further, that such residents conform to the provisions of law applicable to such a purchase in Idaho and in the contiguous state in which the purchase is made. [I.C., § 18-3314, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1969, ch. 145, § 1, p. 470 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

The federal Gun Control Act of 1968 referred to in this section is compiled in 18 U.S.C., §§ 921—928.

18-3315. Resident of contiguous state — Purchase of firearm in Idaho. — Residents of a state contiguous to the state of Idaho may purchase rifles and shotguns in Idaho, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations

thereunder, as administered by the United States secretary of the treasury, and provided further, that such residents conform to the provisions of law applicable to such purchase in Idaho and in the state in which such persons reside. [I.C., § 18-3315, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1969, ch. 145, § 2, p. 470 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

The federal Gun Control Act of 1968 referred to in this section is compiled in 18 U.S.C., §§ 921—928.

18-3316. Unlawful possession of a firearm. — (1) A person who previously has been convicted of a felony who purchases, owns, possesses, or has under his custody or control any firearm shall be guilty of a felony and shall be imprisoned in the state prison for a period of time not to exceed five (5) years and by a fine not to exceed five thousand dollars (\$5,000).

(2) For the purpose of subsection (1) of this section, “convicted of a felony” shall include a person who has entered a plea of guilty, nolo contendere or has been found guilty of any of the crimes enumerated in section 18-310, Idaho Code, or to a comparable felony crime in another state, territory, commonwealth, or other jurisdiction of the United States.

(3) For the purpose of subsection (1) of this section, “firearm” shall include any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas and/or mechanical means, whether operable or inoperable.

(4) Subsection (1) of this section shall not apply to a person whose conviction has been nullified by expungement, pardon, setting aside the conviction or other comparable procedure by the jurisdiction where the felony conviction occurred; or whose civil right to bear arms either specifically or in combination with other civil rights has been restored by any other provision of Idaho law. [I.C., § 18-3316, as added by 1992, ch. 224, § 1, p. 674; am. 2002, ch. 187, § 1, p. 540.]

Sec. to sec. ref. This section is referred to in § 18-310.

Cited in: State v. Weaver, 127 Idaho 288,

900 P.2d 196 (1995); State v. Dreier, — Idaho —, 76 P.3d 990 (Ct. App. 2003).

18-3317. Unlawful discharge of a firearm at a dwelling house, occupied building, vehicle or mobile home. — It shall be unlawful for any person to intentionally and unlawfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, inhabited mobile home, inhabited travel trailer, or inhabited camper. Any person violating the provisions of this section shall be guilty of a felony.

As used in this section, “inhabited” means currently being used for dwelling purposes, whether occupied or not. [I.C., § 18-3317, as added by 1993, ch. 254, § 1, p. 879.]

Compiler's notes. Section 2 of S.L. 1993, ch. 254 declared an emergency. Approved March 29, 1993.

Sec. to sec. ref. This section is referred to in § 18-310.

Cited in: State v. Hudson, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

18-3318. Definitions. — Definitions as used in sections 18-3319, 18-3320 and 18-3321, Idaho Code:

(1) “Bomb” means any chemical or mixture of chemicals contained in such a manner that it can be made to explode with fire or force, and combined with the method or mechanism intended to cause its explosion. The term includes components of a bomb only when the individual charged has taken steps to place the components in proximity to each other, or has partially assembled components from which a completed bomb can be readily assembled. “Bomb” does not include: rifle, pistol or shotgun ammunition and their components; fireworks; boating, railroad and other safety flares or propellants used in model rockets or similar hobby activities.

(2) “Destructive device” means:

(a) Any explosive, incendiary or poisonous gas:

(i) Bomb;

(ii) Grenade;

(iii) Rocket having a propellant charge of more than four (4) ounces;

(iv) Missile having an explosive or incendiary charge of more than one-fourth ($\frac{1}{4}$) ounce;

(v) Mine;

(vi) Similar device.

(b) Any type of weapon, by whatever name known, which will, or which may be imminently converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than .700 inches in diameter, except rifled and unrifled shotguns or shotgun shells.

(c) Components of a destructive device only when the individual charged has taken steps to place the components in proximity to each other, or has partially assembled components from which a completed destructive device can be readily assembled.

(d) The term “destructive device” shall not include:

(i) Any device which is neither designed nor redesigned for use as a weapon;

(ii) Any device which, although originally designed for use as a weapon, has been redesigned for use as a signaling, pyrotechnic, line throwing, safety or similar device;

(iii) Otherwise lawfully owned surplus military ordnance;

(iv) Antiques or reproductions thereof and rifles held for sporting, recreational, investment or display purposes;

(v) Rifle, pistol or shotgun ammunition and their components.

(3) “Shrapnel” means any metal, ceramic, glass, hard plastic or other material of sufficient hardness to puncture human skin when propelled by force of the bomb or destructive device to which it is attached or in which it is contained. [I.C., § 18-3318, as added by 1997, ch. 272, § 1, p. 796; am. 2001, ch. 256, § 1, p. 922.]

18-3319. Unlawful possession of bombs or destructive devices. —

(1) Any person who knowingly, intentionally, or recklessly possesses or controls a bomb or destructive device for a purpose unlawful pursuant to

title 18, Idaho Code, is guilty of a felony, punishable by up to a five thousand dollar (\$5,000) fine and five (5) years in prison.

(2) Any person who knowingly possesses an assembled bomb or assembled destructive device and who:

(a) Has been convicted of a felony; or

(b) Has been found guilty of any crime where such conviction results in the person being prohibited from possessing or owning firearms; or

(c) Is in possession or control of any substance or paraphernalia in violation of section 37-2732B, 37-2734A or 37-2734B, Idaho Code, or the felony provisions of section 37-2732, Idaho Code;

is guilty of a felony, punishable by up to a five thousand dollar (\$5,000) fine and five (5) years in prison.

(3) Any person who possesses a bomb or destructive device which by its design will propel shrapnel is guilty of a felony, punishable by up to a five thousand dollar (\$5,000) fine and five (5) years in prison. [I.C., § 18-3319, as added by 1997, ch. 272, § 1, p. 796; am. 2001, ch. 256, § 2, p. 922.]

Sec. to sec. ref. This section is referred to in §§ 18-310 and 18-3321.

18-3320. Unlawful use of destructive device or bomb. — Any person who knowingly, intentionally, or recklessly:

(1) Conspires to use, uses or causes to be used a destructive device or bomb in the commission of or an attempt to commit a felony; or

(2) With the intent to injure the person or property of another, transports a bomb or destructive device; or

(3) Injures another or conspires or attempts to injure another in his person or property through the use of a destructive device or bomb is guilty of a felony, punishable by up to a twenty-five thousand dollar (\$25,000) fine and life in prison. [I.C., § 18-3320, as added by 1997, ch. 272, § 1, p. 796.]

Sec. to sec. ref. This section is referred to in §§ 18-310 and 20-525A.

18-3320A. Disposal of destructive devices or bombs. — Any destructive device or bomb that has been lawfully seized by a law enforcement agency may be destroyed in a reasonable manner. An official record listing the destructive device or bomb destroyed and the location of destruction shall be kept on file at the office of the seizing agency. In the event of such destruction, a photograph, videotape, or similar record of the device or bomb shall be preserved for evidentiary purposes. The destruction of a destructive device or bomb before a preliminary hearing, trial, or both shall not be a bar to prosecution for any violation of law. [I.C., § 18-3320A, as added by 1999, ch. 299, § 1, p. 751.]

18-3321. Persons exempt. — Unless the intent to injure the person or property of another has been established, the provisions in section 18-3319, Idaho Code, shall not apply to:

(1) Any public safety officer or member of the armed forces of the United States or national guard while acting in his official capacity;

(2) Any person possessing a valid permit issued under the provisions of the international fire code, sections 41-253 and 41-254, Idaho Code, or any employee of such permittee acting within the scope of his employment;

(3) Any person possessing a valid license as an importer, wholesaler, or display operator under the provisions of the Idaho fireworks act, sections 39-2602, 39-2606, 39-2607, 39-2608, 39-2609, 39-2610, 39-2611 and 39-2612, Idaho Code;

(4) A device which falls within the definition of a bomb or destructive device when used on property owned or otherwise in the control of the person using the device;

(5) Those licensed or permitted by the federal government to use or possess a bomb or destructive device.

(6) Those persons who possess a destructive device properly registered and taxed under the provisions of the national firearms act, as amended, as to possession of destructive devices properly registered to such persons. [I.C., § 18-3321, as added by 1997, ch. 272, § 1, p. 796; am. 2002, ch. 86, § 1, p. 195.]

Compiler's notes. Section 2 of S.L. 1997 declared an emergency. Approved March 21, 1997. **Sec. to sec. ref.** This section is referred to in § 18-3318.

Section 2 of S.L. 2002, ch. 86 is compiled as § 22-3426.

18-3322. Use of weapons of mass destruction — Definition. —

(1) Any person who willfully and without lawful authority uses, threatens, attempts or conspires to use a weapon of mass destruction, as defined in this section and including a biological agent, toxin or vector, against any person or property shall be guilty of a felony and shall be punished by a term of up to and including life imprisonment or by a fine not exceeding fifty thousand dollars (\$50,000), or by both.

(2) As used in this section, the term “weapon of mass destruction” means:

(a) Any bomb or destructive device, as those terms are defined in section 18-3318, Idaho Code;

(b) Any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination or impact of toxic or poisonous chemicals or the precursors of such chemicals;

(c) Any weapon involving a disease organism; or

(d) Any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. [I.C., § 18-3322, as added by 2002, ch. 222, § 1, p. 623.]

Compiler's notes. Section 2 of S.L. 2002, ch. 222 is compiled as § 18-3323.

18-3323. Biological weapons — Definitions. — (1) Any person who knowingly develops, produces, stockpiles, transfers, acquires, retains or possesses any biological agent, toxin or delivery system for use as a weapon, or who knowingly assists another person or group of persons in doing so, or attempts, threatens or conspires to do so, shall be guilty of a felony and shall

be punished by imprisonment for a term of up to and including life imprisonment or by a fine not exceeding fifty thousand dollars (\$50,000), or by both.

(2) As used in this section, the term “for use as a weapon” does not include the development, production, stockpiling, transfer, acquisition, retention or possession of a biological agent, toxin or delivery system for prophylactic, protective or other peaceful purposes if such biological agent, toxin or delivery system is of a type and in a quantity that is reasonable for such purposes.

(3) The attorney general of the state of Idaho may obtain in a civil action an injunction against:

- (a) The conduct prohibited under this section;
- (b) The preparation, solicitation, attempt, threat or conspiracy to engage in conduct prohibited under this section; or
- (c) The development, production, stockpiling, acquisition, retention or possession of any biological agent, toxin or delivery system of a type or in a quantity that under the circumstances has no apparent justification for prophylactic, protective or other peaceful purposes.

(4) As used in this section:

(a) “Biological agent” means any microorganism, virus, infectious substance or biological product that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance or biological product that is capable of causing:

- (i) Death, disease or other biological malfunction in any animal, including humans, or any plant or other living organism;
- (ii) Deterioration of food, water, equipment, supplies or material of any kind; or
- (iii) Deleterious alteration of the environment;

(b) “Toxin” means the toxic material of animals, plants, microorganisms, viruses, fungi, infectious substances or a recombinant molecule, whatever its origin or method of production including:

- (i) Any poisonous substance or biological product that may be engineered as a result of biotechnology produced from a living organism; or
- (ii) Any poisonous isomer or biological product, homologue, or derivative of such substance;

(c) “Delivery system” means any apparatus, equipment, device, or means of delivery specifically designed to deliver or disseminate a biological agent, toxin or vector;

(d) “Vector” means a living organism or molecule, including a recombinant molecule, or a biological product that may be engineered as a result of biotechnology capable of carrying a biological agent to a host. [I.C., § 18-3323, as added by 2002, ch. 222, § 2, p. 623.]

18-3324. Use of chemical weapons — Definitions. — (1) Except as provided in subsection (2) of this section, it shall be unlawful for any person to knowingly:

(a) Develop, produce or otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, use or threaten to use any chemical weapon; or

(b) Assist or induce in any way a person to violate, or attempt or conspire to violate, subsection (1) (a) of this section.

(2) Subsection (1) of this section shall not apply to:

(a) The retention, ownership, possession, transfer or receipt of a chemical weapon by a department, agency or other entity of the state of Idaho or the United States; or

(b) Any person, including a member of the armed forces of the United States, who is authorized by law or by an appropriate officer of the state of Idaho or the United States to retain, possess, transfer or receive a chemical weapon; or

(c) To an otherwise nonculpable person in an emergency situation if such person is attempting to seize or destroy the weapon.

(3)(a) Any person who violates this section is guilty of a felony and shall be punished by imprisonment for a term of up to and including life imprisonment or by a fine not exceeding fifty thousand dollars (\$50,000), or by both.

(b) The attorney general of the state of Idaho may bring a civil action in a state district court against any person who violates this section and, upon proof of such violation by a preponderance of the evidence, such person shall be required to pay a civil penalty in an amount not to exceed one hundred thousand dollars (\$100,000) for each violation. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law or administrative remedy which is otherwise available by law to the state of Idaho or any other person.

(c) The court shall order any person convicted of an offense under this section to reimburse the state of Idaho for any expenses incurred by the state incident to the seizure, storage, handling, transportation, destruction or other disposition of any property or material seized in connection with an investigation of the commission of an offense by that person.

(d) The state of Idaho may obtain in a civil action an injunction against any conduct prohibited in subsection (1) of this section or the preparation or solicitation to engage in such conduct.

(4) Nothing in this section shall be construed to prohibit the possession or use of any individual self-defense device, including devices which contain pepper spray or chemical mace.

(5) As used in this section:

(a) "Chemical weapon" means the following, together or separately:

(i) A toxic chemical and its precursors, except where intended for a purpose not prohibited by this section provided the type and quantity of such chemical or precursors are consistent with such a purpose;

(ii) A munition or device that is specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in paragraph (5)(a)(i) of this section and that would be released as a result of the employment of such munition or device;

- (iii) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in paragraph (5)(a)(ii) of this section.
- (b) Except as otherwise provided, “person” means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, the state of Idaho or any political subdivision thereof, or any political entity within the state, any foreign government or nation or any agency, instrumentality or political subdivision of such government or nation located in the state of Idaho.
- (c) “Precursor” means any chemical reactant that takes part at any stage in the production, by whatever method, of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.
- (d) “Purposes not prohibited by this section” means:
 - (i) Any peaceful purpose related to an industrial, agricultural, research, medical or pharmaceutical activity or other activity;
 - (ii) Any purpose directly related to protection against toxic chemicals or chemical weapons;
 - (iii) Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm; or
 - (iv) Any law enforcement purpose, including any domestic riot control purpose and the imposition of capital punishment.
- (e) “Toxic chemical” means any chemical that, through its chemical action on life processes, can cause death, temporary incapacitation or permanent harm to animals, including humans. The term includes all such chemicals, regardless of their form or method of production, and regardless of whether they are produced in facilities, munitions or elsewhere. [I.C., § 18-3324, as added by 2002, ch. 222, § 3, p. 623.]

Compiler’s notes. Section 4 of S.L. 2002, ch. 222 is compiled as § 18-4003.

CHAPTER 34

FLAGS AND EMBLEMS

SECTION.

18-3401. Public mutilation of flag.
18-3402, 18-3403. [Repealed.]

18-3401. Public mutilation of flag. — Any person who publicly mutilates, defaces, or tramples upon or burns, with intent to insult, the flag, standard, colors or ensign of the United States or of the state of Idaho shall be guilty of a misdemeanor. [I.C., § 18-3401, as added by 1981, ch. 323, § 2, p. 671.]

Compiler’s notes. Former § 18-3401 § 1, p. 844) was repealed by S.L. 1981, ch. 323, § 1. [I.C., § 18-3401, as added by 1972, ch. 336,

Collateral References. 35 Am. Jur. 2d, Flags, § 1 et seq.
36A C.J.S., Flags, § 1 et seq.

What constitutes violation of flag desecration statutes. 41 A.L.R.3d 502.

18-3402. Display of red flag or banner of disloyalty prohibited. [Repealed.]

Compiler's notes. Former § 18-3402, which comprised I.C., § 18-3402, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 131, § 15, effective July 1, 1994.

Another former § 18-3402, which com-

prised S.L. 1919, ch. 96, § 1, p. 360; C.S., § 8595; I.C.A., § 17-4609 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3403. Society or fraternal emblems — Fraudulent use. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3403, as added by 1972,

ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 323, § 1.

CHAPTER 35

FORCIBLE ENTRY AND DETAINER

SECTION.

18-3501. [Repealed.]

18-3502. Unlawful re-entry of land after ouster.

18-3501. Forcible entry and detainer defined. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3501, as added by 1972,

ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1.

18-3502. Unlawful re-entry of land after ouster. — Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterward unlawfully returns to settle, reside upon or take possession of such lands, is guilty of a misdemeanor. [I.C., § 18-3502, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6963; C.S., § 8377; I.C.A., § 17-3012 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Reentry of dispossessed person on real property a contempt, § 7-602.

CHAPTER 36

FORGERY AND COUNTERFEITING

SECTION.

18-3601. Forgery defined.

18-3602. False entries in books of record.

18-3603. Public seals — Forging or counterfeiting.

SECTION.

18-3604. Punishment for forgery.

18-3605. Possession of forged notes or bank bills or check or checks.

18-3606. Fictitious bills, notes, and checks —

SECTION.

- Making, passing, uttering, or publishing.
 18-3607. Counterfeiting coin or bullion.
 18-3608. Punishment for counterfeiting.
 18-3609. Possession of counterfeit coin.
 18-3610. Possession of counterfeiting apparatus.
 18-3611. Counterfeiting railroad ticket.
 18-3612. Restoring canceled railroad tickets.
 18-3613. Simulation of switch and car keys.
 18-3614. Forging or counterfeiting trademarks.

SECTION.

- 18-3615. Sale of counterfeit goods.
 18-3616. Forged and counterfeit trade-marks defined.
 18-3617. Trademark defined.
 18-3618. [Repealed.]
 18-3619. Slugs or counterfeited coins — Penalty for use in vending machines or coin-boxes.
 18-3620. Slugs or counterfeited coins — Penalty for manufacture or sale.

18-3601. Forgery defined. — Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits, any charter, letters, patent, deed lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, federal reserve note, United States currency or United States money, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any state controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit action demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands or tenements, or other estate, real or personal, or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine any of the above named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court, or the return of any officer to any process of any court, is guilty of forgery. [I.C., § 18-3601, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 180, § 10, p. 420; am. 2004, ch. 49, § 1, p. 233.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 77; R.S., R.C., & C.L., § 7028; C.S., § 8408; I.C.A., § 17-3701 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 9 of S.L. 1994, ch. 180 is compiled as § 12-118.

Section 11 of S.L. 1994, ch. 180 was compiled as § 20-102 (now repealed). Section 12 of S.L. 1994, ch. 180 is compiled as § 20-235.

Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and

after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 10 of S.L. 1994, ch. 180 became effective January 2, 1995.

Section 2 of S.L. 2004, ch. 49 contains a repeal.

Cross ref. Checks forged or raised, § 28-4-406.

Evidence, falsifying of, § 18-2601 et seq.

Mutilating written instruments, a felony, § 18-3206.

Penalty for forgery, § 18-3604.

Public records and documents, tampering with, § 18-3201 et seq.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: *State v. Hellberg*, 105 Idaho 261, 668 P.2d 137 (Ct. App. 1983); *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986); *State v. Elliott*, 113 Idaho 858, 748 P.2d 1388 (Ct. App. 1988); *State v. Rambo*, 121 Idaho 1, 822 P.2d 31 (Ct. App. 1991); *State v. Beatey*, 123 Idaho 273, 846 P.2d 924 (Ct. App. 1993); *State v. Bayles*, 131 Idaho 624, 962 P.2d 395 (Ct. App. 1998).

ANALYSIS

Affidavit charging insanity.

Elements of forgery.

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Affidavit Charging Insanity.

Affidavit or information before probate judge charging insanity may be subject of forgery. *State v. Burtenshaw*, 25 Idaho 607, 138 P. 1105 (1914).

Elements of Forgery.

The crime of forgery consists in doing one, or more than one, of the acts set forth in the statute, so that a general verdict finding defendant guilty as charged in the information is not insufficient because it fails to show of what particular acts constituting said crime the defendant was guilty. *State v. McDermott*, 52 Idaho 602, 17 P.2d 343 (1932).

Since the amendment of 1931 any and all of the acts mentioned in § 18-3606 as well as all acts mentioned in this section, constitute forgery. *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933).

Where defendant signed another's name to a check, had possession of it, cashed it on date of issue and claimed title thereto, he was conclusively presumed to have forged the check in absence of satisfactory explanation. *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933).

Crime of forgery is committed by making and altering with intent to defraud, as well as by publishing or uttering with intent to defraud, hence if state proves the commission of either act, conviction for forgery will be sustained. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Essential elements of proof of the crime of uttering a forged instrument were: 1. the forged character of the instrument; 2. its utterance as true and genuine by accused; 3. his guilty knowledge of its spurious character; and, 4. the accused's intent to defraud another. *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962).

"Intent to defraud" is simply a purpose to use a false writing as if it were genuine in order to gain some advantage, generally at someone else's expense. *State v. May*, 93 Idaho 343, 461 P.2d 126 (1969).

Evidence.

Any writing either admitted or proved to be genuine is admissible as an exemplar for the purpose of comparison with a disputed writing. *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933).

Conviction for forgery need not be reversed because proof was responsive to offense of signing fictitious name to check. *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933).

In forgery trial proof of the commission of any one of the proscribed acts set out in the former statute, with intent to defraud, is sufficient to sustain conviction of forgery. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Indictment and Information.

Information for forgery must allege that the wrongful act was done with intent to defraud another. *State v. Swensen*, 13 Idaho 1, 81 P. 379 (1905).

Information charging that defendants did wilfully, unlawfully, feloniously, and falsely utter a bank check, and did then and there utter said bank check as true and genuine, with intent to defraud, is fatally defective, in that the part charging making of the instrument fails to allege intent to defraud, and the part charging uttering of the same fails to allege its utterance knowing same to be false, altered, forged, or counterfeited. *State v. Swensen*, 13 Idaho 1, 81 P. 379 (1905).

Information which merely charges forgery of affidavit, but does not specify in what manner or in what particular affidavit was forged, is insufficient. *State v. Burtenshaw*, 25 Idaho 607, 138 P. 1105 (1914).

Instructions.

In prosecution for forgery, court properly refused request of defendant for instruction that state must prove that defendant forged or counterfeited seal or handwriting of another, that he did so knowing same to be forgery and for purpose of defrauding another, and that he uttered, published, passed, or attempted to pass as genuine a forged check, as requested instruction is not a correct statement of the law for forgery. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Where court instructed the jury that the intent to defraud is a necessary element of the crime of forgery, and that existence of that intent must be established by the state beyond a reasonable doubt, it was not error by the court to refuse instruction of the defendant to the effect that in every crime there must be a union of act and intent, since jury had been sufficiently instructed on element of intent in forgery. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Intent.

Where specific intent is part of the crime such as in forgery, intent must be alleged and proved. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

As to the evidence pertaining to the necessary specific intent the defendant had to defraud the recipient of a check, this was a question of fact for the jury. *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962).

Evidence showing the forged nature of an instrument and its possession and utterance by the defendant would be sufficient to warrant an inference of knowledge of the forged nature of the check in the absence of a satisfactory explanation of its acquisition and possession. *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962).

From the fact of uttering and passing a check itself and from the receipt of the proceeds of the check, the jury could properly find the specific intent to defraud on the part of the defendant. *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962).

The jury can infer from the facts surrounding the commission of the crime itself the general criminal knowledge and intent requisite for the commission of the crime as charged, the allegation of "knowingly" and "intentionally" having reference to the general criminal knowledge and intent and not to the specific intent and knowledge necessary to commit the crime of forgery. *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962).

Intoxication.

Where court instructed the jury that it could consider the fact of intoxication in determining whether defendant in passing

check possessed the intention to defraud, it was not error for the court to refuse instruction of the defendant, that if the jury found the defendant was so intoxicated that he could not form an intent to defraud they should acquit the defendant, since jury was properly instructed as to effect of intoxication on intent to defraud. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Sentence.

Ten-year indeterminate sentence imposed on a 71-year-old defendant who had been convicted of at least four prior felonies, upon his conviction of forging his name as payee on a presigned check taken from an elderly disabled woman, did not constitute an abuse of the trial court's discretion. *State v. Howard*, 112 Idaho 110, 730 P.2d 1030 (Ct. App. 1986).

Where defendant's conviction was the result of a scheme to cash forged checks at several banks and he had not been rehabilitated while serving a reduced sentence for a prior felony offense but had persuaded a conspirator to join in the forgery scheme, and that a checkwriting machine was found in his possession at the time of his arrest, the district court did not abuse its discretion in denying defendant's Rule 35 motion and defendant's sentence of 14 years with a required five year minimum to be served was not unduly harsh. *State v. Townsend*, 115 Idaho 460, 767 P.2d 835 (Ct. App. 1989).

Beyond arguing that he has made rehabilitative progress while incarcerated, defendant presented no reasons to support his contention that the court abused its discretion in denying the motion to reduce his sentences; therefore the district court did not abuse its discretion by denying the Rule 35 motion on the conviction for forgery. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

The decision whether a sentence is to run consecutively or concurrently with a previous sentence is committed to the sound discretion of the trial court; therefore, where defendant would serve a total of eight years before he again could be released on parole and the court thought that this lengthy period was necessary in order to protect society, the length of this sentence when served consecutively to the previous sentence did not amount to an abuse of discretion. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Where defendant cashed two checks, each made out to himself on the account of an appliance store, at a grocery store and a bank so that he could purchase cocaine, and defendant had an extensive criminal record, including convictions for burglary and grand theft, two united concurrent sentences of 14 years with a minimum period of confinement of six

years, to run consecutively with a two-year period remaining on a previous sentence, was a reasonable sentence. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Uttering.

While uttering of instrument containing forged endorsement does not raise a *prima facie* presumption that person uttering same forged the instrument, that fact constitutes a circumstance against defendant which the jury has a right to consider in connection with other facts and circumstances of case in arriving at their verdict. *State v. Miles*, 22 Idaho 166, 124 P. 786 (1912).

Venue.

Defendant was tried on information that he both forged and uttered a forged note, two acts which constitute the same crime in Idaho, one of the acts, that of uttering the forged note occurred in Bingham County, therefore said county had jurisdiction over the entire crime under § 19-304. *State v. May*, 93 Idaho 343, 461 P.2d 126 (1969).

Void Instruments.

Where original instrument claimed to have been forged is void upon its face, indictment for forgery will not lie. *People v. Heed*, 1 Idaho 531.

Collateral References. 36 Am. Jur. 2d, Forgery, § 1 et seq.

37 C.J.S., Forgery, § 1 et seq.

Experiments to show erasure of writing by use of chemicals. 8 A.L.R. 40; 85 A.L.R. 479.

Appellate review of evidence as to genuineness of handwriting. 12 A.L.R. 212; 27 A.L.R. 319.

Sentence of judgment, necessity and sufficiency of recital of, or reference to the offense in pronouncing. 14 A.L.R. 999.

Entrapment to commit offense of passing forged instrument. 18 A.L.R. 179; 66 A.L.R. 478; 86 A.L.R. 263.

Altering receipt, canceled check, or other voucher as forgery. 26 A.L.R. 1058.

Genuine making of instrument for purpose of defrauding as constituting forgery. 41 A.L.R. 229; 46 A.L.R. 1529; 51 A.L.R. 568.

Promise by one whose name is forged to take care of paper, effect of. 48 A.L.R. 1368.

Cloud on title, forged instrument as. 78 A.L.R. 182.

Blanks in paper, filling in, in terms other than authorized. 87 A.L.R. 1169.

Alteration of written instrument in order to conform to actual intention as forgery. 93 A.L.R. 864.

Admissibility, in forgery prosecution, of other acts of forgery. 34 A.L.R.2d 777.

Fictitious or assumed name, forgery by use of. 49 A.L.R.2d 852.

Alteration of figures indicating amount of check, bill, or note, without change in written words, as forgery. 64 A.L.R.2d 1029.

Amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying. 86 A.L.R.2d 1283.

Credit charge or credit sales slip, signing of. 90 A.L.R.2d 822.

Procuring signature by fraud as forgery. 11 A.L.R.3d 1074.

Falsifying of money order as forgery. 65 A.L.R.3d 1307.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense. 75 A.L.R.4th 1067.

Evidence of intent to defraud in state forgery prosecution. 108 A.L.R.5th 593.

18-3602. False entries in books of record. — Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery. [I.C., § 18-3602, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 77; R.S., R.C., & C.L., § 7029; C.S., § 8409; I.C.A., § 17-3702 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for forgery, § 18-3604.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-3603. Public seals — Forging or counterfeiting. — Every person who, with intent to defraud another, forges, or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or of any other state, or territory, government, or country, or who falsely makes, forges or counterfeits any

impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and wilfully conceals the same, is guilty of forgery. [I.C., § 18-3603, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 87; R.S., R.C., & C.L., § 7030; C.S., § 8410; I.C.A., § 17-3703 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-3604. Punishment for forgery. — Forgery is punishable by imprisonment in the state prison for not less than one (1) nor more than fourteen (14) years. [I.C., § 18-3604, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 77; R.S., R.C., & C.L., § 7031; C.S., § 8411; I.C.A., § 17-3704 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Forgery of telegraphic messages, § 18-6715.

Sec. to sec. ref. This section is referred to in § 18-3606.

ANALYSIS

Application.
Discretion of court.
Sentence.

Application.

Offense defined in § 18-3606 is punishable as forgery as provided in this section. *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933).

Discretion of Court.

The fact that a defendant received a heavier sentence than his accomplice and another defendant convicted on the same day in the same court of the same offense did not constitute an abuse of discretion. *Davidson v. State*, 92 Idaho 104, 437 P.2d 620 (1968).

The imposition of a five-year sentence on a convicted forger was well within the statutory limits and was not an abuse of the court's discretion or unduly harsh. *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1977).

Where defendant's criminal record included prior convictions for theft and forgery and disclosed numerous probative violations and flight from Oregon just before a hearing on another alleged violation, the trial judge was justified in finding that the sentence of indeterminate term not to exceed seven years was necessary to protect society from repetitions of such prior conduct and there was no abuse of discretion. *State v. Hellberg*, 105 Idaho 261, 668 P.2d 137 (Ct. App. 1983).

Sentence.

Ten-year indeterminate sentence imposed on a 71-year-old defendant who had been convicted of at least four prior felonies, upon his conviction of forging his name as payee on a presigned check taken from an elderly, disabled woman, did not constitute an abuse of the trial court's discretion. *State v. Howard*, 112 Idaho 110, 730 P.2d 1030 (Ct. App. 1986).

Where the defendant had eight prior felony convictions and one misdemeanor conviction on charges of insufficient fund checks and grand theft, and he was on probation under a suspended seven-year sentence for grand theft when he committed the forgery, the district court did not abuse its discretion in imposing a seven-year indeterminate sentence for forgery. *State v. Elliott*, 113 Idaho 858, 748 P.2d 1388 (Ct. App. 1988).

Where, after revoking defendant's probation, district judge ordered original sentence to be fully executed, district judge did not abuse his discretion in declining to reduce the sentence since defendant received a seven-year sentence where he could have received a 14-year term for the offense of forgery because defendant also was charged with possession of stolen property, but that charge was dropped when defendant pled guilty to the forgery, and since defendant later violated the terms of his probation under the forgery judgment. *State v. Adams*, 115 Idaho 1053, 772 P.2d 260 (Ct. App. 1989).

Imposition of concurrent 14-year sentences with three-year minimum periods of confinement for two forgery counts, and a concurrent five-year sentence with a three-year minimum confinement period for burglary was not excessive where the judge cited defendant's continuing record of criminal conduct. *State v. Alexander*, 115 Idaho 897, 771 P.2d 915 (Ct. App. 1989).

Where, while on probation for forgery, defendant committed grand theft and was sentenced to prison where upon her release she was again placed on probation, and where

defendant used cocaine during this period and also fled the state to live in Nevada, upon these facts the district court did not abuse its discretion by revoking probation with regard to the forgery conviction and by imposing a two-year indeterminate sentence. *State v. Stone*, 118 Idaho 205, 795 P.2d 910 (Ct. App. 1990).

In a forgery conviction, considering the non-violent nature of the crime, the background and character of the defendant and the protection of the public interest, the three years' minimum incarceration was unreasonable as the period of time necessary to temporarily protect society from defendant or to accomplish any of the goals of deterrence, rehabilitation or punitive retribution as these purposes reasonably could be served by a minimum period of incarceration of less than three years; a period of two years would be sufficient. *State v. Joslin*, 120 Idaho 462, 816 P.2d 1019 (Ct. App. 1991).

The decision whether a sentence is to run consecutively or concurrently with a previous sentence is committed to the sound discretion of the trial court; therefore, where defendant would serve a total of eight years before he again could be released on parole and the court thought that this lengthy period was necessary in order to protect society, the length of this sentence when served consecutively to the previous sentence did not amount to an abuse of discretion. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Where defendant cashed two checks, each made out to himself on the account of an appliance store, at a grocery store and a bank so that he could purchase cocaine, and defendant had an extensive criminal record, including convictions for burglary and grand theft, two united concurrent sentences of 14 years with a minimum period of confinement of six years, to run consecutively with a two-year period remaining on a previous sentence, was a reasonable sentence. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Defendant's sentences of four years, with two years fixed, were not unreasonable in light of the nature of the crimes he committed and his character as revealed by his past criminal conduct and failures to comply with the rules of probation. *State v. Beaty*, 123 Idaho 273, 846 P.2d 924 (Ct. App. 1993).

A unified eight-year sentence, with four years as the minimum period of confinement for forgery, was reasonable where defendant was already on probation in the State of Minnesota and had several prior convictions. *State v. Lowery*, 123 Idaho 983, 855 P.2d 68 (Ct. App. 1993).

Court did not abuse its discretion in sentencing defendant to four concurrent terms of seven to fourteen years in prison for forgery, where defendant had a criminal record dating back to 1967, which had touched six different states. *State v. Wallmuller*, 125 Idaho 196, 868 P.2d 524 (Ct. App. 1994).

18-3605. Possession of forged notes or bank bills or check or checks. — Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, or check or checks, for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill or check made in the form or similitude of any promissory note or bill or check for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up and complete such blank and unfinished note or bill or check, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison for not less than one (1) nor more than fourteen (14) years. [I.C., § 18-3605, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 82; R.S., R.C., & C.L., § 7033; C.S., § 8413; I.C.A., § 17-3705; S.L. 1969, ch. 206, § 1 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

ANALYSIS

Evidence sufficient.
Sentence.

Evidence Sufficient.

Although some of the documents found in forgery defendant's possession could not have been passed as checks without more work, a rational jury could have determined that defendant intended to continue the process, and the evidence was sufficient to convict defendant of 14 counts of possession of a forged, blank, or unfinished check. *State v. Zaitseva*, 135 Idaho 11, 13 P.3d 338 (2000).

Sentence.

Trial court did not abuse its discretion in sentencing defendant, who was a transient passing through Idaho when he committed the crime, to an indeterminate term not to exceed three years for possession of forged check since court considered likelihood of rehabilitation, the seriousness of the crime and defendant's prior involvement in similar activities. *State v. Delin*, 102 Idaho 151, 627 P.2d 330 (1981).

Collateral References. Unexplained possession or uttering of forged paper as sufficient evidence of place of forging. 164 A.L.R. 649.

18-3606. Fictitious bills, notes, and checks — Making, passing, uttering, or publishing. — Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is guilty of forgery and punishable as provided by section 18-3604. [I.C., § 18-3606, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 83; R.S., R.C., & C.L., § 7034, C.S., § 8414; S.L. 1931, ch. 171, § 1; I.C.A., § 17-3706 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Unlawful circulation of bills, checks, tickets, certificates, promissory notes, or bank paper as money, § 18-3618.

Sec. to sec. ref. This section is referred to in § 18-7803.

ANALYSIS

Burden of proof — nonexistence of purported signator.

Elements of offense.

Evidence.

Instructions.

Intent.

Sentence.

Burden of Proof — Nonexistence of Purported Signator.

In the prosecution of an accused for forgery, the prosecution is not required to prove beyond a reasonable doubt the nonexistence of the person who is supposed or pretended to be indicated by the name signed on an alleged forged instrument. *State v. Raine*, 93 Idaho 862, 477 P.2d 104 (1970).

Elements of Offense.

Since the amendment of 1931 to this section all of the acts mentioned herein, and in § 18-3601, constitute forgery. *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933).

Crime of forgery is committed by making and altering with intent to defraud, as well as by publishing or uttering with intent to defraud, hence if state proves the commission of either act, conviction for forgery will be sustained. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Uttering a check consists in presenting it for payment and the act is then done, even though no money actually has been obtained. *State v. Eubanks*, 86 Idaho 32, 383 P.2d 342 (1963).

One who passes a check purporting to be the check of an existent corporation, signed on behalf of said corporation with the name of a nonexistent person is not guilty of forgery. *State v. Bishop*, 89 Idaho 416, 405 P.2d 970 (1965).

Evidence.

Evidence of other forgeries is admissible in a forgery prosecution for the purpose of proving intent, motive, scienter or guilty knowledge, identity or for the purpose of showing that the particular crime charged was a part of a system. *State v. Eubanks*, 86 Idaho 32, 383 P.2d 342 (1963).

Instructions.

By the trial court's instruction the jury's deliberation in a forgery action on the other checks was limited to the specific fields: of proving "knowledge" by evidence of the acts of commission of similar offenses only prior to the date of the alleged offense and of proving "fraudulent intent" by all evidence, both prior and subsequent to the date of the alleged offense. *State v. Eubanks*, 86 Idaho 32, 383 P.2d 342 (1963).

Intent.

Where specific intent is part of the crime such as in forgery, intent must be alleged and

proved. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Sentence.

Indeterminate sentence act applied. In re *Setters*, 23 Idaho 270, 128 P. 1111 (1913), overruled to the point of conflict, *Spanton v. Clapp*, 78 Idaho 239, 299 P.2d 1103 (1956).

Collateral References. Entrapment to commit offense of passing forged instrument. 18 A.L.R. 179; 66 A.L.R. 478; 86 A.L.R. 263.

Presumptions and inferences in criminal cases from unexplained possession or uttering of forged paper. 164 A.L.R. 621.

18-3607. Counterfeiting coin or bullion. — Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind of species of gold dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes or procures the same to be sold, uttered or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting. [I.C., § 18-3607, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 78, 88; R.S., R.C., & C.L., § 7035; C.S., § 8415; I.C.A., § 17-3707 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

ANALYSIS**

Elements of offense.

Extent of debasement.

Elements of Offense.

Simply passing counterfeit gold dust is not a criminal offense; uttering must be accompanied with knowledge that article is counterfeit, and must have been uttered with intention to defraud. *People v. Sloper*, 1 Idaho 158 (1867).

Crime of uttering or attempting to utter counterfeit gold dust consists in possession of

counterfeit or spurious gold dust, knowing it to be such, and passing it or attempting to pass it with intent to defraud. *People v. Page*, 1 Idaho 189 (1868).

Extent of Debasement.

No definite amount of proportion or relative difference in the actual value of genuine gold dust and that which is counterfeit is required; it is sufficient that it be debased and that party uttering it knows this and passes it for genuine. *People v. Page*, 1 Idaho 189 (1868).

Collateral References. 20 Am. Jur. 2d, Counterfeiting, § 1 et seq.

20 C.J.S., Counterfeiting, § 1 et seq.

Entrapment to commit crime. 18 A.L.R. 160; 66 A.L.R. 478; 86 A.L.R. 263.

"Infamous offense," conspiracy to make counterfeit coin as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1008.

Reduction by appellate court of punishment imposed by trial court for counterfeiting. 29 A.L.R. 333; 89 A.L.R. 295.

18-3608. Punishment for counterfeiting. — Counterfeiting is punishable by imprisonment in the state prison for not less than one (1) nor more than fourteen (14) years. [I.C., § 18-3608, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 78; R.S., R.C., & C.L., § 7036; C.S., § 8416; I.C.A., § 17-3708 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3609. Possession of counterfeit coin. — Every person who has in his possession, or receives for any other person, any counterfeit gold or silver coin of the species current in this state, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces, or nuggets, with the intention to sell, utter, put off, or pass the same, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years. [I.C., § 18-3609, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 79, 89; R.S., R.C., & C.L., § 7037; C.S., § 8417; I.C.A., § 17-3709 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-3610. Possession of counterfeiting apparatus. — Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, metal, machine, or other thing whatever, made use of in counterfeiting coin, current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lump, pieces or nuggets, or in counterfeiting bank notes, bank bills, financial transaction cards, cashier's checks, money orders, travelers checks, or any check, draft or order for the payment of money upon any bank or depository drawn on any person, firm or corporation, is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years; and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed. [I.C., § 18-3610, as added by 1972, ch. 336, § 1, p. 844; am. 1982, ch. 220, § 1, p. 596.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 84, 88; R.S., R.C., & C.L., § 7038; C.S., § 8418; I.C.A., § 17-3710 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

Presumption from Possession.

Knowingly and secretly keeping instruments adapted and intended for the unlawful business of counterfeiting is presumptive evidence of intention to use them for that purpose, which presumption defendant is called upon to rebut. *People v. Page*, 1 Idaho 102 (1868).

18-3611. Counterfeiting railroad ticket. — Every person who counterfeits, forges, or alters, any ticket, check, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, designed to entitle the holder to ride in the cars of such company, or who utters, publishes, or puts into circulation, any such counterfeit or altered ticket, check, or order, coupon, receipt for fare, or pass, with intent to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the state prison, or in the county jail, not exceeding one (1) year, or by fine not exceeding \$1000, or by both such imprisonment and fine. [I.C., § 18-3611, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7039; C.S., § 8419; I.C.A., § 17-3711 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3612. Restoring canceled railroad tickets. — Every person who, for the purpose of restoring to its original appearance and nominal value in whole or in part, removes, conceals, fills up, or obliterates, the cuts, marks, punch holes, or other evidence of cancelation, from any ticket, check, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, canceled in whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the county jail not exceeding six (6) months, or by a fine not exceeding \$1000, or by both such imprisonment and fine. [I.C., § 18-3612, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7040; C.S., § 8420; I.C.A., § 17-3712 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3613. Simulation of switch and car keys. — It shall be unlawful for any person by himself or another, without the written order or consent of such common carrier, to make, simulate, sell or dispose of any key belonging to or which might be used to open or unlock any switch, lock, car lock, or locks, used upon or belonging to any switch or car of any kind owned, controlled or operated by any common carrier in this state. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$100.00 nor more than \$300.00, or by imprisonment in the county jail not less than thirty (30) days nor more than six (6) months. [I.C., § 18-3613, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1893, p. 70, §§ 1, 2; reen. 1899, p. 182, §§ 1, 2; reen. R.C., & C.L., § 7041; C.S., § 8421; I.C.A., § 17-3713 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3614. Forging or counterfeiting trade-marks. — Every person who wilfully forges or counterfeits or procures to be forged or counterfeited, any trade-mark usually affixed by any person to his goods, with intent to pass off any goods to which such forged or counterfeited trade-mark is affixed or intended to be affixed, as the goods of such person, is guilty of a misdemeanor. [I.C., § 18-3614, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 80; R.S., & R.C., § 6862; reen. C.L., § 7042; C.S., § 8422; I.C.A., § 17-3714 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when

not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in §§ 18-3617 and 18-7803.

18-3615. Sale of counterfeit goods. — Every person who sells or keeps for sale any goods upon or to which any counterfeited trade-mark has been affixed, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor. [I.C., § 18-3615, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 81; R.S., & R.C., § 6863; reen. C.L., § 7043; C.S., § 8423; I.C.A., § 17-3715 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in §§ 18-3617 and 18-7803.

18-3616. Forged and counterfeit trade-marks defined. — The phrases “forged trade-mark” and “counterfeited trade-marks,” or their equivalents, as used in this chapter include every alteration or imitation of any trade-mark so resembling the original as to be likely to deceive. [I.C., § 18-3616, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 6864; reen. R.C., & C.L., § 7044; C.S., § 8424; I.C.A., § 17-3716 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3617. Trademark defined. — The phrase “trademark” as used in the three (3) preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description. [I.C., § 18-3617, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 6865; reen. R.C. & C.L., § 7044a; C.S., § 8425; I.C.A., § 17-3717 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3618. Circulating illegal money. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3618, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 2004, ch. 49, § 2.

A former § 18-3618, which comprised Cr. & P. 1864, § 149; R.S., R.C., & C.L., § 7209;

C.S., § 8588; I.C.A., § 17-4602 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3619. Slugs or counterfeited coins — Penalty for use in vending machines or coin-boxes. — Any person who, by means of any token, slug, false or counterfeited coin, or by any other means, method, trick or

device whatsoever not lawfully authorized by the owner, lessee, or licensee of any vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance of or connection with the sale, use or enjoyment of property or service, knowingly shall operate or cause to be operated, or shall attempt to operate or attempt to cause to be operated, any vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America, or whoever shall take, obtain, accept or receive, from or by means of any such machine, coin-box telephone or other receptacle, any article of value or service or the use or enjoyment of any telephone, telegraph or other facility or service, without depositing in, delivering to and payment into such machine, coin-box telephone or receptacle the amount of lawful coin of the United States of America required therefor by the owner, lessee or licensee of such machine, coin-box telephone or other receptacle, shall be fined not more than two hundred dollars (\$200.00), or imprisoned not more than sixty (60) days, or both. [I.C., § 18-3619, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1939, ch. 68, § 1, p. 120 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3620. Slugs or counterfeited coins — Penalty for manufacture or sale. — Any person who knowingly or having cause to believe that the same is intended for fraudulent or unlawful use on the part of the purchaser, donee or user thereof shall manufacture for sale, sell or give away any token, slug, blank, disc, tag, planchet, false, mutilated, sweated or counterfeited coin or any device or substance whatsoever intended or calculated to be placed, deposited or used or which may be so placed, deposited or used in any vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance or connection with the sale, use or enjoyment of the property or service or the use or enjoyment of any telephone, telegraph or other facilities or service, shall be fined not more than two hundred dollars (\$200.00), or imprisoned not more than sixty (60) days, or both. [I.C., § 18-3620, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1939, ch. 68, § 2, p. 120 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Vending machines, validity and construction of statutes prohibiting or regulating. 111 A.L.R. 755; 151 A.L.R. 1195.

CHAPTER 37

FRAUDULENT CONVEYANCES OR REMOVALS

SECTION.

18-3701 — 18-3706. [Repealed.]

18-3701 — 18-3704. Fraudulent conveyances or removals. [Repealed.]

Compiler's notes. These sections, which comprised §§ 18-3701 — 18-3704, as added by 1972, ch. 336, § 1, p. 844 were repealed by S.L. 1981, ch. 319, § 2.

18-3705. Removal or sale of mortgaged chattels. [Repealed.]

Compiler's notes. This section, comprising S.L. 1885, p. 74, § 13; R.S., R.C. & C.L., § 7100; C.S., § 8479; I.C.A., § 17-3907 regarding removal or sale of mortgaged chattels was repealed by S.L. 1967, ch. 161, § 10-102, effective at midnight on December 31, 1967.

18-3706. Removal or sale of property subject to security agreement. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3706, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 2.

CHAPTER 38

GAMING

SECTION.

18-3801. Gambling defined.
18-3802. Gambling prohibited.
18-3803 — 18-3807. [Repealed.]
18-3808. Officers to enforce law.

SECTION.

18-3809. Book making and pool selling.
18-3810. Slot machines — Possession unlawful — Exception.

18-3801. Gambling defined. — “Gambling” means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, but does not include:

(1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or

(2) Bona fide business transactions which are valid under the law of contracts; or

(3) Games that award only additional play; or

(4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or

(5) Other acts or transactions now or hereafter expressly authorized by law. [I.C., § 18-3801, as added by 1992, (1st Ex. Sess.), ch. 2, § 3, p. 4.]

Compiler's notes. A former section, which comprised S.L. 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 11, p. 1102; am. 1991, ch. 230, § 1, p. 548 was repealed by S.L. 1992, ch. 2, § 2, effective August 15, 1992.

Another former section, which comprised S.L. 1897, p. 53, § 1; S.L. 1899, p. 389, § 1; reen. R.C., C.L., § 6850; C.S., § 8307; S.L. 1921, ch. 116, § 1, p. 292; I.C.A., § 17-2301; S.L. 1945, ch. 112, § 3, p. 171; 1947, ch. 29,

§ 4, p. 28; 1947, ch. 151, § 7, p. 171; S.L. 1947, ch. 239, § 9, p. 592; S.L. 1953, ch. 62, § 2, p. 82 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

The bracketed word “baccarat” near the end of the introductory paragraph was inserted by the compiler.

S.L. 1992, (1st Ex. Sess.), Ch. 2, § 5, read as follows:

“An emergency existing therefor, which

emergency is hereby declared to exist, Sections 2, 3 and 4 of this act shall be in full force and effect on and after August 15, 1992. Section 1 of this act shall be in full force and effect on and after the date of adoption of House Joint Resolution No. 4, First Extraordinary Session, Fifty-first Idaho Legislature, amending Article III, Section 20 of the Constitution of the State of Idaho by the electorate of the State of Idaho at the 1992 general election as required by law.”

Cross ref. Gambling prohibited — exceptions, Const., Art. 3, § 20.

Bingo and raffles, §§ 67-7701 et seq.

Sec. to sec. ref. This chapter is referred to in §§ 67-7447, 67-7703 and 67-7706.

This section is referred to in §§ 18-3810 and 18-7803.

ANALYSIS

Application.

Devices prohibited.

Prohibited on reservations.

Application.

Regarding whether playing video machines constitutes a lottery as defined by this section, all that is required is the risking of any money, credit, deposit, or other thing of value; risking credits worth five cents each fits within the statute. *MDS Invs., LLC v. State*, 138 Idaho 456, 65 P.3d 197 (2003).

Devices Prohibited.

Trial court did not err in concluding that a corporation's video machines constituted ille-

gal gambling devices; the player would be gambling (risking something of value for the chance of winning a prize) regardless of whether the player initiated play by paying a dollar or presenting a voucher. *MDS Invs., LLC v. State*, 138 Idaho 456, 65 P.3d 197 (2003).

Although a corporation argued that its video machines fit within an exception provided by subsection (4) of this section for merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, the machines did not fit within this exception because prizes were awarded with consideration being charged to participants. *MDS Invs., LLC v. State*, 138 Idaho 456, 65 P.3d 197 (2003).

Prohibited on Reservations.

Neither the language of Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.), the legislative history and statement of purpose of the Act, nor the later federal cases interpreting the Act, can be read to allow tribes to conduct casino-type gaming on reservations in Idaho, when the laws and public policy of Idaho are so clearly against such gaming. *Coeur D'Alene Tribe v. State*, 842 F. Supp. 1268 (D. Idaho 1994), aff'd, 51 F.3d 876, cert. denied, 133 U.S. 209, 116 S. Ct. 305, 133 L. Ed. 2d 209 (1995).

*

DECISIONS UNDER PRIOR LAW

ANALYSIS

Application.

Devices prohibited.

Mandamus.

Money seized.

Nuisance.

Pinball machines.

Punishment.

Application.

This general law prohibiting gambling repeals authority of Boise City under its charter to license gambling. In re *Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897).

Payment of taxes or licensing of a gambling machine or device, furnishes no justification for its operation in violation of the anti-gambling laws. *Pepple v. Headrick*, 64 Idaho 132, 128 P.2d 757 (1942).

Devices Prohibited.

In construing a statute making it a misdemeanor to operate certain enumerated devices or “any other device” employed in gambling, the ejusdem generis doctrine was

inapplicable, and the prohibition of the statute was not limited to devices similar to those enumerated. *Pepple v. Headrick*, 64 Idaho 132, 128 P.2d 757 (1942).

Mandamus.

District court acted in excess of its jurisdiction in issuing an alternate writ of mandate to compel a probate judge to hear, consider and pass on a demurrer to complaint charging commission of indictable misdemeanor, gambling, since the legislature had made no provision for interposing a demurrer to a complaint in such a preliminary examination. *Quinlan v. Glennon*, 68 Idaho 282, 193 P.2d 403 (1948).

Money Seized.

The court may not direct the return of money seized in a raid on a gambling place. *State v. McNichols*, 62 Idaho 616, 115 P.2d 104 (1941).

Nuisance.

Machines, instruments, and devices designed and intended for carrying on gambling

operations are nuisances. *Mullen & Co. v. Moseley*, 13 Idaho 457, 90 P. 986, 12 L.R.A. (n.s.) 394, 121 Am. St. R. 277, 13 Ann. Cas. 450 (1907).

Pinball Machines.

Pinball machines which automatically returned to the player a specific number of nickels if he were successful in lodging the ball in the proper hole, were gambling devices and their seizure and confiscation would not be restrained. *Pepple v. Headrick*, 64 Idaho 132, 128 P.2d 757 (1942).

Where pinball machine was so constructed that in the event a certain knob was hit the player would receive additional play, the additional play was a representative of value within purview of statute making the machine subject to seizure. *Thamart v. Moline*, 66 Idaho 110, 156 P.2d 187 (1945).

The right to additional play on a pinball machine clearly falls within the meaning of the word "credit" and is certainly a right of "value" within the meaning of the statute. *Thamart v. Moline*, 66 Idaho 110, 156 P.2d 187 (1945).

An "add-a-ball" type of pinball machine which, upon attainment of a certain score, automatically awarded the player an additional play, but gave no money or free games, was not violative of the former section. *State v. Fitzpatrick*, 89 Idaho 568, 407 P.2d 309 (1965).

Punishment.

This act declares violations thereof to constitute a misdemeanor and fixes the minimum penalty, but prescribes no maximum, consequently § 18-113, prescribing penalty for misdemeanors generally, governs as to the maximum penalty. *State v. Mulkey*, 6 Idaho 617, 59 P. 17 (1899); *In re Rowland*, 8 Idaho 595, 70 P. 610 (1902).

One convicted of gambling may be sentenced to pay both a fine and to undergo imprisonment. *In re Burgess*, 12 Idaho 143, 84 P. 1959 (1906).

Collateral References. 38 Am. Jur. 2d, Gambling, § 1 et seq.

38 C.J.S., Gaming, § 1 et seq.

Telegraph ticker service, obligation to furnish for gambling purposes. 1 A.L.R. 1295; 45 A.L.R. 1379.

Witness, asking as to pursuing occupation of gambling for purposes of impeachment. 1 A.L.R. 1402.

Married woman's criminal responsibility for keeping gaming house. 4 A.L.R. 282; 71 A.L.R. 1116.

Disbarment or suspension of attorney for gambling. 9 A.L.R. 203.

Sentence or judgment for gambling, necessity and sufficiency of recital of, or reference to, the offense. 14 A.L.R. 1000.

Vagrancy, gambling as. 14 A.L.R. 1491.

Connection with place where gaming is carried on which will render one guilty as keeper thereof. 15 A.L.R. 1202.

Reduction by appellate court of punishment imposed by trial court. 29 A.L.R. 324; 89 A.L.R. 295.

Each bet or play at gaming on a single occasion, as constituting a distinct offense. 35 A.L.R. 89.

Slot and vending machines as gambling devices. 38 A.L.R. 73; 81 A.L.R. 177; 135 A.L.R. 138.

Racing as game within statute. 45 A.L.R. 998.

Constitutionality of statute forbidding or regulating dissemination of betting odds or other gambling information. 47 A.L.R. 1135.

Constitutionality of statute making one act prima facie evidence of another in prosecution for gambling. 51 A.L.R. 1158; 86 A.L.R. 179; 162 A.L.R. 495.

Pari-mutuel and similar betting methods on race as game of chance or gambling. 52 A.L.R. 74.

Telephone company's liability respecting communications as to gambling transaction. 62 A.L.R. 182.

Money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, rights and remedies in respect of. 79 A.L.R. 1007.

Constitutionality of statute which affirmatively permits pari-mutuel method of wagering at race tracks. 85 A.L.R. 622.

Constitutionality of statute predicating criminality upon reputation of premises being used for gambling. 92 A.L.R. 1232.

Bequest of "money" as including money put up on bets. 93 A.L.R. 543; 173 A.L.R. 656.

Statutes permitting specified forms of betting, construction and application of. 117 A.L.R. 828.

Prohibitory statute or ordinance, slot machine within, as limited to gambling device. 132 A.L.R. 1004.

What are games of chance, games of skill, and mixed games of chance and skill. 135 A.L.R. 104.

Racing as game of chance. 135 A.L.R. 183.

Coin-operated or slot machine which may be played for amusement only or which confines winner's reward to privilege of additional play or other form of amusement, as within antigambling statutes. 148 A.L.R. 879; 89 A.L.R.2d 815.

Possession of gambling device as offense not requiring showing that device was used for gambling or kept for gambling purposes. 162 A.L.R. 1188.

Winner's rights and remedies in respect of pari-mutuel and similar legalized betting systems. 165 A.L.R. 838.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises or if such activities took place. 19 A.L.R.2d 1228.

Entrapment to commit offense with respect to gambling or lotteries. 31 A.L.R.2d 1212.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling. 64 A.L.R.2d 823.

Criminal conspiracies as to gambling. 91 A.L.R.2d 1148.

Bridge as within gambling laws. 97 A.L.R.2d 1420.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 A.L.R.3d 473.

Constitutionality of statutes providing for destruction of gambling devices. 14 A.L.R.3d 366.

Promotion schemes of retail stores as criminal offense under antigambling laws. 29 A.L.R.3d 888.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

18-3802. Gambling prohibited. — (1) A person is guilty of gambling if he:

- (a) Participates in gambling; or
- (b) Knowingly permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.

(2) Gambling is a misdemeanor. [I.C., § 18-3802, as added by 1992, (1st Ex. Sess.), ch. 2, § 4, p. 4.]

Compiler's notes. A former section, which comprised S.L. 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1992, (1st Ex. Sess.), ch. 2, § 2, effective August 15, 1992.

Another former section, which comprised S.L. 1897, p. 53, § 2; S.L. 1899, p. 389, § 2; reen. R.C., & C.L., § 6851; C.S., § 8308; I.C.A., § 17-2302 was repealed by S.L. 1971,

ch. 143, § 5, effective January 1, 1972.

Section 5 of S.L. 1992, (1st Ex. Sess.), ch. 2, § 5 declared an emergency and provided that sections 2, 3, and 4 of the act should take effect on and after August 15, 1992. See also Compiler's note to § 18-3801.

Sec. to sec. ref. This section is referred to in § 18-7803.

* DECISIONS UNDER PRIOR LAW

ANALYSIS

Effect on common law.
Money.
Slot machines.

Effect on Common Law.

Common law relating to offense of keeping a gaming house was superseded by act of January 13, 1871, specifying certain inhibited games. *People v. Goldman*, 1 Idaho 714 (1878).

Money.

Money found in gambling devices seized in a raid on alleged gambling premises and used as evidence, was an integral part of the devices, and was to be paid to the state treasurer for benefit of the permanent school

fund, the owner of the device having no claim to such money. *State v. McNichols*, 62 Idaho 616, 115 P.2d 104 (1941).

Slot Machines.

Replevin will not lie to recover gambling device known as "slot machine." *Mullen & Co. v. Moseley*, 13 Idaho 457, 90 P. 986, 12 L.R.A. (n.s.) 394, 121 Am. St. R. 277, 13 Ann. Cas. 450 (1907).

Slot machines, like other gambling devices, are not "property" but rather, "contraband," subject to seizure and summary destruction. *State v. McNichols*, 62 Idaho 616, 115 P.2d 104 (1941).

Collateral References. Connection with place where gaming is carried on which will render one guilty as keeper thereof. 15 A.L.R. 1202.

18-3803. Cheating at games. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3803 as added by S.L.

1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

Another § 18-3803, which comprised S.L. 1897, p. 53, § 3; S.L. 1899, p. 389, § 3; reen. R.C., & C.L., § 6852; C.S., § 8309; I.C.A.,

§ 17-2303 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-3804 — 18-3807. Judge to issue warrant — Execution — Refusal to testify — Self-incrimination. [Repealed.]

Compiler's notes. The following sections were repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994:

18-3804, which comprised I.C., § 18-3804, as added by 1972, ch. 336, § 1, p. 844; am. 1986, ch. 8, § 1, p. 48.

18-3805, which comprised I.C., § 18-3805, as added by 1972, ch. 336, § 1, p. 844.

18-3806, which comprised I.C., § 18-3806, as added by 1972, ch. 336, § 1, p. 844.

18-3807, which comprised I.C., § 18-3807, as added by 1972, ch. 336, § 1, p. 844.

Another former § 18-3804, which comprised S.L. 1897, p. 53, § 4; S.L. 1899, p. 389, § 4; reen. R.C., & C.L., § 6853; C.S., § 8310; I.C.A., § 17-2304; S.L. 1947, ch. 151, § 8, p. 359; S.L. 1953, ch. 62, § 3, p. 82 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Another former § 18-3805, which comprised S.L. 1897, p. 53, § 5; am. S.L. 1899, p. 389, § 5; reen. R.C., & C.L., § 6854; C.S., § 8311; I.C.A., § 17-2305 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Another former § 18-3806, which comprised S.L. 1897, p. 53, § 6; S.L. 1899, p. 389, § 6; reen. R.C., & C.L., § 6855; C.S., § 8312; I.C.A., § 17-2306 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Another former § 18-3807, which comprised S.L. 1897, p. 53, § 7; am. S.L., 1899, p. 389, § 7; reen. R.C., & C.L., § 6856; C.S., § 8313; I.C.A., § 18-2307 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-3808. Officers to enforce law. — Every prosecuting or county attorney, sheriff, constable or police officer, must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor. [I.C., § 18-3808, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1897, p. 53, § 8; am. S.L. 1899, p. 389, § 8; reen. R.C., & C.L., § 6857; C.S., § 8314; I.C.A., § 17-2308 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: State v. Mulkey, 6 Idaho 617, 59 P. 17 (1899).

18-3809. Book making and pool selling. — Any person who for gain, hire or profit engages in pool selling or book making at any time or place within this state; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or any part thereof, or who occupies any place or stand of any kind, upon any public or private grounds within this state, with books, papers, paraphernalia, or mechanical device, for the purpose of engaging in pool selling or book making, or recording or registering bets or wagers; or who sells pools or makes books upon the result of any trial or contest of skill, speed or power of endurance of man or beast for gain, hire or reward; or any person who, for gain, hire or reward, receives, registers, records and forwards to any other place, within or without this state, any money, consideration or thing of value for the purpose of having it there bet or wagered by or for any person, who at such place sells pools or makes books upon any such event, or any person who, being the owner, lessee or occupant of any such room, shed, tenement, tent,

booth or building, float or vessel, or part thereof, or any grounds within this state, knowingly and wilfully permits the same to be occupied and used for any of the purposes aforesaid, unless unable to legally prevent the same; or any person who aids, assists or abets in any manner in any of said acts which are hereby forbidden, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$300 or by imprisonment in the county jail for a period of not more than six (6) months or by both such fine and imprisonment. [I.C., § 18-3809, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1913, ch. 76, § 1, p. 327; reen. C.L., § 6858; C.S., § 8315; I.C.A., § 17-2309 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

Cited in: State v. Bird, 29 Idaho 47, 156 P. 1140 (1916).

18-3810. Slot machines — Possession unlawful — Exception. —

(1) Except as otherwise provided in this section, it shall be a misdemeanor and punishable as provided in section 18-3801, Idaho Code, for any person to use, possess, operate, keep, sell, or maintain for use or operation or otherwise, anywhere within the state of Idaho, any slot machine of any sort or kind whatsoever.

(2) The provisions of section 18-3804, Idaho Code, shall not apply to antique slot machines. For the purpose of this section, an antique slot machine is a slot machine manufactured prior to 1950, the operation of which is exclusively mechanical in nature and is not aided in whole or in part by any electronic means.

(3) Antique slot machines may be sold, possessed or located for purposes of display only and not for operation.

(4) An antique slot machine may not be operated for any purpose. [I.C., § 18-3810, as added by 1986, ch. 8, § 2, p. 48.]

Compiler's notes. Section 18-3804, referred to in subsection (2), was repealed.

Section 1 of S.L. 1986, ch. 8 was repealed.

ANALYSIS

Applicability.
Constitutionality.
Illegal devices.

Applicability.

Device is still a slot machine even though the player uses a token, bill, or credit account to place a bet, and the machine pays winnings by dispensing a token or receipt or by adding credits to the player's account. MDS Invs., LLC v. State, 138 Idaho 456, 65 P.3d 197 (2003).

Considering the technological changes, a slot machine is a gambling device which, upon payment by a player of required consideration in any form, may be played or operated, and which, upon being played or operated, may, solely by chance, deliver or entitle the player

to receive something of value, with the outcome being shown by spinning reels or by a video or other representation of reels. MDS Invs., LLC v. State, 138 Idaho 456, 65 P.3d 197 (2003).

Constitutionality.

The definition of "slot machine" is sufficiently definite so that people of common intelligence do not have to guess at the meaning; therefore, this section is not unconstitutionally vague. MDS Invs., LLC v. State, 138 Idaho 456, 65 P.3d 197 (2003).

Illegal Devices.

Trial court did not err in concluding that a corporation's video machines constituted illegal gambling devices; the player would be gambling (risking something of value for the chance of winning a prize) regardless of whether the player initiated play by paying a dollar or presenting a voucher. MDS Invs., LLC v. State, 138 Idaho 456, 65 P.3d 197 (2003).

CHAPTER 39

HIGHWAYS AND BRIDGES

SECTION.

- 18-3901 — 18-3904. [Repealed.]
 18-3905. Transportation of hazardous waste.
 18-3906. Placing debris on highways.
 18-3907. Obstruction of highways.
 18-3908. Flooding highways.
 18-3909. [Repealed.]
 18-3910. Evasion of toll.
 18-3911. Wild flowers or shrubs along high-

SECTION.

- way — Removal or transport illegal.
 18-3912. Prosecution of violators — Duty of transportation department.
 18-3913. Wild flowers protected — Amended list — Duty of department of fish and game.
 18-3914. Violation a misdemeanor.

18-3901. Highway or bridge — Punishment for injuring. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3901, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1.

18-3902. Toll house or gate — Injuring, a misdemeanor. [Repealed.]

Compiler's notes. Former § 18-3902, which comprised I.C., § 18-3902, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994. Another former § 18-3902, which comprised R.S., R.C., & C.L., § 7134; C.S., § 8518; I.C.A., § 17-4108, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-3903. Milestones and guideposts — Injuring, a misdemeanor. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3903, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1. 1885, p. 277, § 29; R.S., R.C., & C.L., § 7135; C.S., § 8519; I.C.A., § 17-4109, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Another former § 18-3903 which comprised

18-3904. Structures, landscaping or beautification appurtenant to state highways — Injuring a misdemeanor — Civil liability. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3904, as added by 1972, ch. 336, § 1, p. 844; am. 1974, ch. 12, § 85, p. 61, was repealed by S.L. 1981, ch. 319, § 1. Another former § 18-3904, which comprised 1937, ch. 184, § 1, p. 308, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-3905. Transportation of hazardous waste. — (1) Whenever hazardous waste, as defined in section 39-4403, Idaho Code, is being transported on highways or roads of this state, it shall be transported in a manner which will not endanger the health, welfare or safety of the citizens of the state of Idaho and it shall be transported in compliance with the laws of the state of Idaho and rules and regulations promulgated thereto.

(2) Any person who transports hazardous waste or any generator of hazardous waste or other person who causes hazardous waste to be transported on highways or roads of this state in a manner which will

endanger the health, welfare or safety of the citizens of the state of Idaho, or who transports or causes hazardous waste to be transported on highways or roads of this state in a manner which is not in compliance with the laws of the state of Idaho and any rules and regulations promulgated pursuant thereto shall be guilty of a misdemeanor and shall be subject to a fine of not more than ten thousand dollars (\$10,000), imprisonment for a period of not more than six (6) months, or by both such fine and imprisonment. This penalty shall be in addition to any other civil or criminal penalties which may be provided by law. [I.C., § 18-3905, as added by 1984, ch. 205, § 13, p. 502.]

Compiler's notes. Former § 18-3905, which comprised I.C., § 18-3905, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1.

Another former § 18-3905, which comprised 1937, ch. 220, § 1, p. 395, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Section 12 of S.L. 1984, ch. 205 is compiled as § 67-2918.

Section 14 of S.L. 1984, ch. 205 declared an emergency. Approved April 3, 1984.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-3906. Placing debris on highways. — (1) If any person shall wilfully or negligently throw from any vehicle, place, deposit or permit to be deposited upon or alongside of any highway, street, alley or easement used by the public for public travel, any debris, paper, litter, glass bottle, glass, nails, tacks, hoops, cans, barbed wire, boards, trash or garbage, lighted material, or other waste substance, such persons shall, upon conviction thereof, be punished by a fine not exceeding three hundred dollars (\$300) or by imprisonment in the county jail not exceeding ten (10) days. For the purposes of this section, the terms "highway," "street," "alley" or "easement" shall be construed to include the entire right of way of such highway, street, alley or easement. The Idaho transportation department is directed to post along state highways, at convenient and appropriate places, notices of the context of said law.

(2) Notwithstanding the provisions of section 19-4705, Idaho Code, the court may order that fifty dollars (\$50.00) of the fine imposed under the provisions of this section be paid by the defendant to the person or persons, other than the officer making the arrest, who, in the judgment of the court, provided information that led directly to the arrest and conviction of the defendant. [I.C., § 18-3906, as added by 1972, ch. 336, § 1, p. 844; am. 1974, ch. 12, § 86, p. 61; am. 1986, ch. 298, § 1, p. 747.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 116, § 1, p. 374; reen. C.L., § 7135a; C.S., § 8520; I.C.A., § 17-4110; am. S.L. 1953, ch. 37, § 1, p. 56; am. S.L. 1957, ch. 39, § 1, p. 73, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 85 of S.L. 1974, ch. 12 was codified as § 18-3904. Section 18-3904 was repealed in 1981. Present version of section 84 of S.L. 1974, ch. 12 is compiled as § 49-1315. Section 87 of S.L. 1974, ch. 12 is compiled as § 18-3911.

Cross ref. Placing debris on public or private property, misdemeanor, § 18-7031.

Sec. to sec. ref. This section is referred to in § 40-510.

18-3907. Obstruction of highways. — Any person who obstructs, injures or damages any public road, street or highway, either by placing obstruction therein or by digging in, deepening or deviating the water of any stream, or by placing any obstruction in any ditch or stream within or along any public road, street or highway, or by placing or constructing any obstruction, ditch or embankments upon his own or other lands, so as to make or cause any water to flow upon or impair any public road, street or highway, or rides or drives upon and along the sidewalk of any road, street or highway, whenever such sidewalk has been graded or graveled, located or designated by any order of the board of commissioners or city council, or prepared in any other manner dedicating and designating the same for and to that particular use and purpose, either by the property owner or by the public, or in any other manner injures or obstructs any public road, street or highway, is guilty of a misdemeanor. [I.C., § 18-3907, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1885, p. 162, § 37; R.S., R.C., & C.L., § 7138; C.S., § 8522; I.C.A., § 17-4111, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

ANALYSIS

Evidence.

Intent.

Road by prescription.

Evidence.

A map prepared by the county surveyor showing the roads and their classification in Gem County and the general geographical location of the road in question while not recorded as a county road map of Gem County was properly admitted in evidence to establish the road which was obstructed by appellant as a prescriptive public road. *State v. Nesbitt*, 79 Idaho 1, 310 P.2d 787 (1957).

Where the testimony sustained the finding

of the jury to the effect that appellant knew or should have known that the obstruction complained of was placed in a public highway, his act wilfully and intentionally done cannot be excused because he believed, if he did, that the road was a private one. *State v. Nesbitt*, 79 Idaho 1, 310 P.2d 787 (1957).

Intent.

Wicked, wilful or criminal intent to violate the statute under which appellant was prosecuted for blocking a public road is not an essential ingredient of the crime. *State v. Nesbitt*, 79 Idaho 1, 310 P.2d 787 (1957).

Road by Prescription.

Where landowner fences his land and leaves a tract fifty feet wide outside of his fence for a public road and public travels such road for five years or more, public has acquired a prescriptive right thereto and owner may not obstruct said road. *State v. Berg*, 28 Idaho 724, 155 P. 968 (1916).

Collateral References. 39 Am. Jur. 2d, Highways, Streets and Bridges, § 337 et seq. 40 C.J.S., Highways, §§ 222 — 231, 252.

18-3908. Flooding highways. — Any person who runs water either by flooding or sprinkler irrigation across any public highway, road or street, without first constructing a good and sufficient ditch or ditches to convey the same, or who fails to bridge such ditch or ditches, or to keep such bridge or ditches in good repair, or to ensure that the flow from the sprinkler does not flood the public highway, road or street and all persons, companies or corporations who suffer any water used by them for the purpose of irrigation, or any other purposes, to flow into or upon any public highway, road or street, in any other manner than that authorized by law, are guilty of an infraction on the first offense, and shall be guilty of a misdemeanor for each offense thereafter per calendar year, and upon conviction thereof must be fined in any sum not less than one dollar (\$1.00) nor more than fifty

dollars (\$50.00), together with the costs of suit, and for a second offense, double said fine and costs; and it is hereby made the duty of all road supervisors, constables and marshals, to make complaint before the proper court, for violations of this section, whenever notified or having knowledge thereof. A person may not be charged under the provisions of this chapter if the flooding from a sprinkler or other water conveyance system is a result of mechanical failure, wind or other climatic condition, or other circumstances outside of the control of the person. [I.C., § 18-3908, as added by 1972, ch. 336, § 1, p. 844; am. 2001, ch. 289, § 1, p. 1026.]

Compiler's notes. A former section, which comprised 1885, p. 162, § 42; R.S., R.C., & C.L., § 7139; C.S., § 8523; am. 1931, ch. 91, § 1, p. 154; I.C.A., § 17-4112, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 2001, ch. 289 is compiled as § 18-3914.

Cited in: Lewiston v. Booth, 3 Idaho 692, 34 P. 809 (1893).

18-3909. Racing on highways. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-3909, as added by 1972, ch. 336, § 1, p. 844, effective April 1, 1972 was repealed by S.L. 1972, ch. 381, § 7, effective April 1, 1972.

Another former § 18-3909 which comprised R.S., R.C., & C.L., § 6928; C.S., § 8354; I.C.A., § 17-2712, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-3910. Evasion of toll. — Every person not exempt from paying tolls who crosses on any ferry or toll bridge, or passes through any toll gate, lawfully kept, without paying the toll therefor and with intent to avoid such payment is punishable by fine not exceeding \$20.00. [I.C., § 18-3910, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6922; C.S., § 8347; I.C.A., § 17-3919, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-3911. Wild flowers or shrubs along highway — Removal or transport illegal. — (1) It is the duty of all citizens of this state to protect the wild flowers of this state referred to in this section from needless destruction and waste.

(2) It shall be unlawful for any person in this state to wilfully and negligently cut, dig up, trim, pick, or remove, any plant, flower, shrub, bush, fruit or other vegetation growing upon the right of way of any public highway within this state.

(3) It shall be unlawful for any person to export from this state, or to sell or offer for sale or transport bulbs, corms, rhizomes, roots or plants of native wild flowers or shrubs of the state of any of the following genera:

- a. Tiger lily . . . *Lilium Columbianum*
- b. Queen Cup . . . *Clintonia uniflora*
- c. Trillium (both species)
- d. Lady's Slipper . . . *Cypripedium montanum*
- e. Stream orchis . . . *Epipactis Gigantea*

- f. Coral root . . . *Corallorhiza* (all species)
- g. Columbine . . . *Aquilegia formosa*
- h. Syringa or mock orange . . . *Philadelphus lewisii*
- i. Dogwood . . . *Cornus nuttallii* and *canadensis*
- j. Indian Pipe Family (all members)
- k. Rhododendron (all species)
- l. Twin Flower . . . *Linnaea americana*
- m. Mission bells or rive root . . . *Fritillaria lanceolata*
- n. Bitter root . . . *Lewisia rediviva*
- o. Angel slipper, fairy slipper . . . *Calypso bulbosa*

(4) It shall be unlawful for any person to sell or transport or offer for sale the bulbs, corms, rhizomes, roots or parts of any of the plants or shrubs mentioned in subsections (2) and (3) of this section which have been dug, pulled up or gathered upon any highway.

(5) The provisions of this section shall not be construed to apply to any employee of the federal government or of the state of Idaho or of any political subdivision of the state engaged in work upon any state, county or public road or highway while performing such work under the supervision of the federal government, the state or any political subdivision thereof.

(6) The provisions of this section shall not be construed to apply to the owner of any tract or tracts of land, or to his agents or employee, as to such tract or tracts, or to any shrub, plant or other vegetation which is declared by law to be a public nuisance.

(7) Nothing in this section shall be construed as prohibiting the digging, pulling, gathering or sending out of this state, at such times the Idaho transportation department may approve, any propagated plants or shrubs mentioned in subsections (2) and (3) of this section, in such quantity and at such times as the agency or persons having control of the land, public or private, may determine and approve. [I.C., § 18-3911, as added by 1972, ch. 336, § 1, p. 844; am. 1974, ch. 12, § 87, p. 61.]

Compiler's notes. A former section, which comprised S.L. 1967, ch. 430, § 1, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the

section as it existed prior to its repeal.

Section 86 of S.L. 1974, ch. 12 is compiled as § 18-3906.

Sec. to sec. ref. This section is referred to in § 18-3913.

18-3912. Prosecution of violators — Duty of transportation department. — Insofar as the state highway system is concerned, it shall be the duty of the Idaho transportation department and of all its employees to present evidence of any violation of the provisions of this act to the prosecuting attorney of the county in which any such violations occur. Such prosecuting attorney shall prosecute any person guilty of a violation of the provisions of this act. [I.C., § 18-3912, as added by 1972, ch. 336, § 1, p. 844; am. 1974, ch. 12, § 88, p. 61.]

Compiler's notes. A former section, which comprised S.L. 1967, ch. 430, § 2, p. 1415,

was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

The words “this act” refer to §§ 18-3911 — 18-3914.

Section 89 of S.L. 1974, ch. 12 is compiled herein as § 62-301.

Section 124 of S.L. 1974, ch. 12 provided the act should be in full force and effect on and after July 1, 1974.

18-3913. Wild flowers protected — Amended list — Duty of department of fish and game. — (a) In order to further protect native wild flowers and shrubs from needless destruction and waste, the department of fish and game may, after investigation and public hearings and in accordance with the provisions of this act, establish and amend a list of wild flowers and shrubs in addition to those listed in section 18-3911(3), Idaho Code. The provisions of this act will then apply to such “established” or “amended” list.

(b) In determining additions to the list of wild flowers set forth herein, the department of fish and game may take into consideration:

(1) The laws and regulations of the United States and other states.

(2) The effect on the scenic beauty of public roads and public land.

(3) The necessity to preserve and protect native plants whenever it appears that they might possibly become extinct. [I.C., § 18-3913, as added by 1972, ch. 336, § 1, p. 844; am. 2003, ch. 129, § 1, p. 379.]

Compiler’s notes. A former section, which comprised S.L. 1967, ch. 430, § 3, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

The words “this act” refer to §§ 18-3911 — 18-3914.

Section 2 of S.L. 2003, ch. 129 is compiled as § 36-2402.

18-3914. Violation a misdemeanor. — A violation of this chapter and regulations authorized by this act is a misdemeanor unless the violation is defined as an infraction. [I.C., § 18-3914, as added by 1972, ch. 336, § 1, p. 844; am. 2001, ch. 289, § 2, p. 1026.]

Compiler’s notes. A former section, which comprised S.L. 1967, ch. 430, § 4, p. 1415, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

The words “this act” refer to §§ 18-3911 — 18-3914.

Section 1 of S.L. 2001, ch. 289 is compiled as § 18-3908.

CHAPTER 40

HOMICIDE

SECTION.

18-4001. Murder defined.

18-4002. Express and implied malice.

18-4003. Degrees of murder.

18-4004. Punishment for murder.

18-4004A. Notice of intent to seek death penalty.

18-4005. Petit treason abolished.

18-4006. Manslaughter defined.

18-4007. Punishment for manslaughter.

18-4008. [Repealed.]

18-4009. Justifiable homicide by any person.

SECTION.

18-4010. Fear not sufficient justification.

18-4011. Justifiable homicide by officer.

18-4012. Excusable homicide.

18-4013. Discharge of defendant when homicide justifiable or excusable.

18-4014. Administering poison with intent to kill.

18-4015. Assault with intent to murder.

18-4016. Definition of human embryo and fetus — Prohibiting the prosecution of certain persons.

18-4001. Murder defined. — Murder is the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill. [I.C., § 18-4001, as added by 1972, ch. 336, § 1, p. 844; am. 1977, ch. 154, § 1, p. 390; am. 2002, ch. 330, § 1, p. 935.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 15; R.S., R.C., & C.L., § 6560; C.S., § 8209; I.C.A., § 17-1101, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 1977, ch. 154 is compiled as § 18-4003.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Homicide caused by placing obstruction on railroad track is murder, § 18-6011.

Homicide caused by stealing of car parts is murder, § 18-6007.

Juvenile charged with murder, when proceeded against as adult, § 20-509.

Sec. to sec. ref. This section is referred to in §§ 18-7803, 19-5307, 19-5506, 20-525A, and 39-1113.

Cited in: State v. Foley, 95 Idaho 222, 506 P.2d 119 (1973); State v. Aragon, 107 Idaho 358, 690 P.2d 293 (1984); State v. Pennell, 108 Idaho 669, 701 P.2d 289 (Ct. App. 1985); State v. Merrifield, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985); Sivak v. State, 112 Idaho 197, 731 P.2d 192 (1986); State v. Simons, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987); State v. Weinmann, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992); State v. Pederson, 124 Idaho 179, 857 P.2d 658 (1993); State v. Espinoza, 127 Idaho 194, 898 P.2d 1105 (Ct. App. 1995); State v. Contreras, 133 Idaho 862, 993 P.2d 625 (Ct. App. 2000); State v. Thomas, 133 Idaho 682, 991 P.2d 870 (Ct. App. 1999); State v. Santana, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000); State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000); State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000); Matthews v. State, 136 Idaho 46, 28 P.3d 387 (Ct. App. 2001).

ANALYSIS

Cross-examination.
Double jeopardy.
Dual juries.

Elements of offense.

Evidence.

—Confession.

—Malice aforethought.

—Photographs.

—Sufficiency of.

Included offense.

Instructions to jury.

Intent.

Intoxication as defense.

Malice.

—Sufficient evidence.

Opening statement.

Premeditation.

Prosecutor's comments.

Punishment.

Sanity of defendant.

Sentence.

—Not excessive.

Solicitation of attempted murder.

Sufficiency of charge.

Sufficiency of indictment.

Torture murder.

—Intent.

—Jury instructions.

—Lesser included offense.

Cross-Examination.

Where the defense, on cross-examination, attempted to elicit from police officer testimony that his true motive in telling witness not to discuss case with others was to prevent disclosure of witness having failed polygraph tests, the trial court properly limited the cross-examination in order to prevent the introduction of potentially prejudicial polygraph information; the court gave the defense considerable latitude in its attempt to establish that the witness had changed his statements because of police accusations that he was lying, and no prejudice was shown. State v. Wheeler, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985).

Double Jeopardy.

Giving the double jeopardy statute, § 18-301 (repealed), its broadest possible application, it is not a bar to the present prosecution for robbery because both the robbery and the

murder did not arise out of the same act or omission; the act of taking property from the deceased by means or force or fear was separate from the act of firing the shots which killed him, defendant's companion having flagged the deceased to a stop, defendant was handed deceased's wallet after parking their car and, hearing a shot and inquiring, was told to go home. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

It is clear from the former statutory definitions that murder and robbery are separate, distinct and independent crimes; neither is the "same offense" as the other, within the constitutional provision against double jeopardy, and prosecution for one does not bar a subsequent prosecution on the other on that ground. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

It is obvious, from the definition of robbery in § 18-6501, that the murder information did not purport to charge defendant with the crime of robbery, and it was insufficient for that purpose; therefore, defendant after acquittal on the charge of murder was not entitled to an instruction that the robbery was the same offense as that for which he had been previously charged. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

Dual Juries.

Where the trial judge was cautious and meticulous in his conduct of trial before dual juries and there was no indication whatsoever that the dual jury procedure resulted in any unfairness, prejudice or violation of defendant's constitutional rights, there was no error in using a dual jury procedure in trying two co-defendants for murder. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 474 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

The trial court did not deprive the defendant of due process by jointly trying him with his codefendant and using separate juries sitting in the same courtroom, where the codefendant testified before the defendant's jury, and the defendant had the opportunity to cross-examine him as to any statements presented through the testimony of other witnesses. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Elements of Offense.

Where defendant was charged both with first-degree murder and with conspiracy to commit first-degree murder, which involve differing elements of proof, and there existed a reasonable doubt whether the state met its burden of proof as to the distinguishing element of causation, the jury's verdicts acquitting defendant of first-degree murder, but convicting her of conspiracy, were reconcilable on a rational basis, and the trial court prop-

erly denied defendant's motion for a new trial. *State v. Garcia*, 102 Idaho 378, 630 P.2d 665 (1981).

Where the record disclosed no statement by the district judge informing the defendant of the malice element, and there was nothing in the record refuting the defendant's allegation that his attorney also failed to advise him of the essential elements necessary to the charge of assault with intent to commit murder, there existed at least a material issue of fact whether the defendant understood the nature of the charge against him; consequently, summary dismissal of the defendant's petition for post-conviction relief was reversed. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

The proof of a murder in the first degree may be established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery; the requirement of "malice aforethought" is satisfied by the fact the killing was committed in the perpetration of a robbery. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Evidence.

Where evidence showed in trial of defendant charged with attempt to commit murder that defendant pointed a loaded gun at complaining witness, who was within range of bullet fired from gun, and said "give me my cigarette lighter or I will kill you" and promptly fired when complaining witness said he didn't have the lighter, it was sufficient to justify verdict of guilty. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Where the evidence showed that defendant and his wife had contemplated divorce and had separated, that defendant had picked up his shotgun at his cabin outside of town, and that on the fatal evening his truck was seen outside the deceased's home amid loud demands by a male voice for entry, and later a voice, identified as his, reported the homicide anonymously, the jury had sufficient circumstantial evidence from which to infer that the defendant was guilty of the murder. *State v. Fenley*, 103 Idaho 199, 646 P.2d 441 (Ct. App. 1982).

Where the defendant admitted that she taped the victim with duct tape prior to his murder by stabbing, the testimony of the state's pathologist that the manner in which the tape was affixed to the victim's face would have prevented any breathing was relevant to provide a complete description of the crime and to show the defendant's state of mind and intent. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 408 (1986).

The destruction of the body of the murder

victim did not constitute a violation of the due process right to have access to potentially exculpatory evidence, since the body held evidence allegedly relating to only the jurisdictional question and not to questions of guilt or excuse. *Gibson v. State*, 110 Idaho 631, 718 P.2d 283 (1986).

—Confession.

Where the defendant was questioned for five minutes about the location of the murder victim's car and she then agreed to make a confession, at which point she was read her Miranda rights, the defendant was not coerced into giving a statement, and the confession was admissible. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

—Malice Aforethought.

Element of malice aforethought required by this section must be found to exist in order to sustain conviction of murder in the first degree accomplished by the administration of poison. *State v. Phinney*, 13 Idaho 307, 89 P. 634, 12 L.R.A. (n.s.) 935, 12 Ann. Cas. 1079 (1907).

In a murder prosecution, because of the use to which knife of defendant was put and results of this use, it will be classified as a deadly weapon and therefore it is to be concluded that there was both express and implied malice on behalf of defendant immediately prior to the time he took the life of the deceased. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Inasmuch as the defendant took the life of deceased and did so with malice aforethought, it necessarily must follow that he is guilty of murder. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may be presumed; such a presumption may be rebutted. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

Where evidence in murder prosecution indicated that defendant armed himself while still in bar and was preparing for subsequent violent confrontation outside bar, the evidence of the crucial element of intent was not so insubstantial that the jurors could not help but have a reasonable doubt as to proof of that element; to the contrary, the evidence, and the inferences reasonably drawn from it, strongly supported the conclusion that defendant acted with malice and, accordingly, the court did not err in denying motion for a judgment of acquittal. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may

be presumed; it is the province of the jury to determine whether the evidence in the record only supports a conviction of voluntary manslaughter or whether there is sufficient proof of malice to justify a conviction for first-degree murder. Thus, where the evidence established that the defendant placed a loaded gun against the chest of the victim and pulled the trigger, the jury could properly have presumed that the defendant acted with malice. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Where a defendant uses a deadly weapon in a deadly manner, the element of malice can be presumed. *State v. Ziegler*, 107 Idaho 1133, 695 P.2d 1272 (Ct. App. 1985).

—Photographs.

The trial court has the discretion to admit into evidence photographs of the victim in a homicide case as an aid to the jury in arriving at a fair understanding of the evidence, as proof of the corpus delicti, the extent of the injury, and the condition of the body, and for their bearing on the question of the degree and atrociousness of the crime. The fact that the photographs depict the actual body of the victim and the wounds inflicted and may tend to excite the emotions of the jury is not a basis for excluding them. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

Although the prosecutor's purported reason for admitting the photographs of the murder victim's slit throat was to assist the expert witness with his testimony, and in retrospect, the photographs were not used for that purpose, they were nonetheless relevant evidence where, even though the cause of death was drowning, it was clear that the victim had had her throat slit and that the throat slitting had either preceded the drowning or had happened at the same time. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Photographs of the victim in a prosecution for homicide, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, are, in the discretion of the trial court, admissible in evidence as an aid to the jury in arriving at a fair understanding of the evidence. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 963, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

—Sufficiency of.

Where the evidence indicated that the victim suffered numerous injuries at the hands of the defendant over a one year period, and evidence presented as to the defendant's relationships with others close to him dispelled any possible conclusion that the defendant's

treatment of the victim was solely for purposes of discipline, there was more than enough evidence presented to justify a murder by torture instruction to the jury and substantial competent evidence to support the verdict. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985). See *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Evidence was sufficient to support the verdict of first degree murder where defendant had previously perpetrated several acts of violence toward victim and he had also made threats to kill her, where victim's daughter heard shots and when she went to the barn to investigate, daughter observed defendant holding a rifle pointed at victim as victim sat wounded on the ground, and where at the time of his apprehension, defendant acknowledged to the arresting officer that he had shot the victim. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Included Offense.

The allegation that the homicide occurred in the perpetration of a felony does not charge the accused with the commission of the felony referred to, nor make it an offense included in the murder charge; it merely characterizes the murder as to degree. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

The murder charged in the information to have been committed by means of a gun was an allegation of robbery only as a condition or circumstance characterizing the murder as first degree but the robbery was not an "included offense" in the murder charge. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

The aggravated battery was not a lesser included offense of murder because a jury reasonably could conclude from the evidence that the victim had suffered an aggravated battery prior to the germination of the idea to murder him. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Instructions to Jury.

Various instructions considered. *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910).

Giving of additional instructions which in no way modify the definitions contained in this and following sections is not error. *State v. Willis*, 24 Idaho 252, 132 P. 962 (1913).

Instructions quoting §§ 18-4001 — 18-4006 upheld where defendant was charged with murder in the first and second degree, and voluntary and involuntary manslaughter.

State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (1937).

There was no prejudicial error in quoting the language of the former section in an instruction to the jury defining murder. *State v. Anstine*, 91 Idaho 169, 418 P.2d 210 (1966).

An instruction defining murder substantially in the language of the former section, accompanied by other instructions defining "malice aforethought" substantially in the language of § 18-4002, defining terms "feloniously," "wilfully," "premeditatedly," and "deliberately," and defining the degrees of murder substantially in the language of § 18-4003, adequately distinguished between murder in the first and second degree. *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968).

Where jury is fully instructed concerning the frame of mind required by § 18-4002, it was harmless error for the court to also instruct as to the definition of malice as found in § 18-101, even though that definition is not applicable in a murder case. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

In a murder prosecution the use of the word "malice" instead of "malice aforethought" in jury instructions was not error where word "malice" was used for the same purpose and in same manner in §§ 18-4002, 18-4006, which used word "malice" to refer to "malice aforethought." *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Where, in prosecution for second-degree murder and aggravated battery, the jury instructions required the jury to consider whether the defendant had become so intoxicated at the time of the shootings that he could not act with malice aforethought, the trial judge did not err in refusing to give further instructions concerning the effect of intoxication. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

A jury need not be instructed in the esoteric distinctions between general and specific intent, and where the instructions to the jury repeatedly emphasized that before defendant could be convicted he must have acted with the intent to kill victim, the jury instructions, when read and considered as a whole, adequately instructed the jury concerning the elements of murder in the first and second degree and manslaughter, and the distinctions between each including intent. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

District court did not abuse its discretion in deciding not to give a jury instruction on involuntary or voluntary manslaughter as lesser offenses of first-degree murder where evidence showed that a 12 gauge shotgun was fired into an occupied room exhibiting a wanton disregard for human life which might lead

a jury to infer "malice aforethought" which is an element of both first and second-degree murder but not to involuntary manslaughter; additionally there was no evidence to indicate the murder took place in the heat of passion. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), cert. denied, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Where defendant objected to language in jury instructions taken from this section, §§ 18-4002 and 18-4006 defining murder, malice and manslaughter, as incomprehensible and unnecessarily confusing, the Court of Appeals noted that until the legislature chose to amend the language of the statutes, the court was bound by the words that the legislature had chosen for the definition of various crimes. *State v. Carsner*, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995).

Intent.

In trial of defendant charged with assault with intent to commit murder the evidence must be sufficient to convince jury that assault was made with intent to commit murder, and with malice aforethought. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Intent of defendant to kill complaining witness was not negated as a matter of law where complaining witness was close enough to defendant to be hit by bullet fired from defendant's gun. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Where defendant pointed his gun at the victim with whom he had altercation and the gun discharged causing death, the conviction of second-degree murder was proper and the circumstances of the shooting would not support a conviction of voluntary manslaughter. *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971).

The jury's finding that defendant possessed the intent necessary to commit murder was not the finding as to the degree of his capacity to appreciate and conform his conduct required by § 19-2523. *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

Where there was sufficient evidence to show that the defendant had the requisite intent to kill a human being and then acted in furtherance of that intent by encouraging another to carry through with the plan, convictions on two counts of attempted murder were affirmed. *State v. Fabeny*, 132 Idaho 917, 980 P.2d 581 (Ct. App. 1999).

Intoxication as Defense.

Intoxication is no defense to murder charge but the state of intoxication is competent in determining the capacity of accused to form the homicidal intent where there is no evidence of malice, premeditation or motive. The statute requires proof of malice aforethought

to convict. *State v. Frank*, 60 Idaho 774, 97 P.2d 410 (1939).

Voluntary intoxication is no excuse for a felonious homicide, but may be considered in determining existence or nonexistence of malice aforethought, which distinguishes murder from voluntary manslaughter. *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941).

Evidence that defendant and deceased were personal friends, that they drank liquor in sufficient quantities to cause them to fight over the ownership of a part of a bottle of beer, and that in the sudden quarrel and heat of passion, defendant shot and killed the deceased, was sufficient to sustain a conviction of manslaughter. *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941).

From all the evidence in a murder prosecution it appears that the defendant must not be so far intoxicated as would preclude him from knowing the difference between right and wrong and being able to complete a social pattern. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Malice.

—Sufficient Evidence.

Where defendant not only fired a warning shot into the air without regard to where the bullet would stray, but also aimed his gun at decedent and another man and pulled the trigger, knowing that some of the chambers were loaded, such use of a deadly weapon was sufficient evidence of malice. *State v. Jaco*, 130 Idaho 870, 949 P.2d 1077 (Ct. App. 1997).

Opening Statement.

Where in opening statement in murder prosecution, the prosecutor made no more than an objective summary of evidence he reasonably expected to produce, and any potential for misleading the jury was diminished by the witness's repudiation of the testimony he was expected to give and, in any event, both general and specific limiting instructions were given by the trial judge to the jury, the trial court did not err in denying defendant's motion for a mistrial predicated upon the prosecutor's opening statement and the failure of witness to testify as outlined by the prosecutor. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

Premeditation.

Premeditation is not an essential element of crime of assault with intent to commit murder. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Prosecutor's Comments.

The prosecution's reference to the defendant as "the man with the machete" or "machete man" was not prejudicial, especially since the defense counsel objected to the use of the defendant's name, and the defendant

did not object to the use of those terms at trial. *State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986).

Punishment.

Assault with intent to commit murder has only one punishment and does not contain two degrees. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Trial court had no other alternative than to find the defendant guilty of wilful, deliberate, and premeditated killing with malice aforethought in view of the defendant's act of deliberately opening up a pocket knife, next cutting the victim's throat and then hacking and cutting until he had killed the deceased and expended himself and the imposition of the death sentence under the circumstances was not an abuse of discretion by the trial court under such facts and circumstances. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Sanity of Defendant.

Where state in murder prosecution introduced testimony to show defendant knew the difference between right and wrong at the time of the homicide and no other witness testified as to defendant's sanity, therefore, it is concluded defendant has the mental ability to reason and had the capacity to formulate malice aforethought. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Sentence.

Where defendant, who was with three others, allowed decedent to be beaten, humiliated and murdered; fired shots into the dead body; after a night of rest, returned to scene of the slaying and burned the body in a shallow grave; and never reported the crime to the authorities, five year fixed sentence for conviction of accessory to murder was not cruel and unusual punishment. *State v. Toney*, 130 Idaho 858, 949 P.2d 1065 (Ct. App. 1997).

—Not Excessive.

After considering defendant's age and the nature and circumstance of his crime, 25-year term of confinement was not grossly disproportionate where he killed another human being by shooting the victim four times at point-blank range without any provocation, as the utter disregard for human life demonstrated in the commission of crime, coupled with the fact that it was committed against a law enforcement officer, might well have led to imposition of the death penalty or a fixed life sentence if the perpetrator had been an adult, and under circumstances, even in view of defendant's youth, court could not say that the sentence was out of all proportion to the gravity of the offense or such as to shock the conscience of reasonable people. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Where the district court considered defendant's young age, lack of intellect and childhood abuse as mitigating factors, yet concluded that the heinous nature of the crime and poor prognosis for rehabilitation required that court be attentive to the sentencing goals of punishment and deterrence, conviction and unified life sentence with minimum 29 years for first degree murder of his two and one-half year old stepson was affirmed. *State v. Walker*, 129 Idaho 409, 925 P.2d 413 (Ct. App. 1996).

Where, after binding victim (an acquaintance), beating and humiliating him, defendant put his gun against victim's head and shot him and then burned the body and buried him in a shallow grave and after being arrested for first degree murder, defendant pled guilty to second degree murder, sentence of indeterminate life sentence, with a minimum period of confinement of twenty-five years under the facts of the case was not disproportionate to the crime committed and because of the particularly heinous nature of the crime, and the fact that the minimum period of confinement of 25 years was the probable duration of confinement, such sentence was not excessive. *State v. Robertson*, 130 Idaho 287, 939 P.2d 863 (Ct. App. 1997).

Solicitation of Attempted Murder.

Where defendant agreed to pay an undercover agent \$1,000 to kill a police officer and actually paid him \$250 in "up front" money before being arrested, he could not be convicted for attempted murder since his only actions were those of solicitation by the preparatory act of inciting another to commit the crime and there was no actus reus in actually committing the crime; moreover, the partial payment made was a "slight act" only in furtherance of the solicitation rather than a preparatory act sufficiently proximate to establish an attempt. *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981).

Sufficiency of Charge.

In a charge of murder of the first degree, the allegation that the homicide was committed in the perpetration of, or attempt to perpetrate, one of the named felonies, may be relied on by the judge in lieu of the otherwise necessary allegation and proof of deliberation and premeditation, in order to show that the homicide was murder of the first degree. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

The crime of murder may be committed without the commission of any of the felonies named in the former statute, and the allegation that the homicide was committed while its perpetrators were engaged in a robbery does not charge that the robbery was the manner or means upon which the murder was accomplished. *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963).

Sufficiency of Indictment.

For former rule, see *State v. Walters*, 1 Idaho 271 (1869); *Perry v. State*, 4 Idaho 224, 38 P. 655 (1894); *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903); *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905); *State v. Squires*, 15 Idaho 545, 98 P. 413 (1908); *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911); *In re McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913); *State v. Lundhigh*, 30 Idaho 365, 164 P. 690 (1917); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

For a number of years it was deemed sufficient in this state to charge murder in general terms, however, the present rule requires the acts or facts of the killing to be alleged. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941).

Information charging on a certain day in a certain county that defendant murdered a human being was not fatally defective for failure to charge place of death. *State v. Walters*, 61 Idaho 341, 102 P.2d 284 (1940).

If the means by and manner in which the alleged crime was committed are unknown to the prosecutor, he must so allege in the information. *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941).

Manslaughter is an offense included in the charge of murder. *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941).

Torture Murder.

—Intent.

This section provides that, irrespective of proof of intent to cause suffering, the infliction of extreme and prolonged acts of brutality is torture, and torture causing death shall be deemed the equivalent of intent to kill; therefore, the infliction of extreme and prolonged acts of brutality not accompanied by proof of intent to cause suffering, or by proof of executing vengeance, or by proof of extortion, or by proof of satisfying a sadistic inclination, is second degree torture murder. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Attempted first degree murder by torture, absent a specific showing of intent, is not a crime in Idaho, because first degree murder by torture does not require a specific showing of intent to sustain a conviction, but the crime of attempt does require a specific showing of intent to commit the underlying crime. *State v. Luke*, 134 Idaho 294, 1 P.3d 795 (2000).

—Jury Instructions.

A jury instruction as to a charge of first degree torture murder should state that first degree murder by torture consists of death of the victim caused by the intentional infliction of extreme and prolonged pain with the intent to cause suffering, or the death of the victim

caused by the infliction of extreme and prolonged acts of brutality with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy a sadistic inclination. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Where victim's entire body had been severely beaten, with multiple trauma to the head, bruises too numerous to count, subdural hemorrhaging, ventricular hemorrhaging, lacerations on the lips and chin, and several areas of the scalp where hair had been broken off, the condition of the body appeared to support a murder by torture jury instruction. *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997), cert. denied, 523 U.S. 1126, 118 S. Ct. 1813, 140 L. Ed. 2d 951 (1998).

—Lesser Included Offense.

Second degree murder by torture, i.e., brutality torture murder, without a demonstration of intent as provided in § 18-4003(a), is a lesser included offense of first degree torture murder. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Collateral References. 40 Am. Jur. 2d, Homicide, § 1 et seq.

40, 41 C.J.S., Homicide, § 1 et seq.

Attempt to conceal or dispose of body as evidence connecting accused with homicide. 2 A.L.R. 1227.

Intent to aid and abet perpetrator, or entering into his design, as necessary to make one present at homicide without preconcert or conspiracy, criminally responsible. 12 A.L.R. 277.

Admissibility of dying declaration with respect to transaction prior to homicide. 14 A.L.R. 757.

Homicide by unlawful act aimed at another. 18 A.L.R. 917.

Instruction as to lesser degree of crime, duty of court as to where statute fixes degree of homicide in perpetration of felony. 21 A.L.R. 628; 27 A.L.R. 1097; 102 A.L.R. 1019.

Entrapment to attempt to commit murder. 66 A.L.R. 504; 86 A.L.R. 263.

Intoxication as affecting deliberation and premeditation. 79 A.L.R. 904.

Instructions, applying rule of reasonable doubt as to intent or malice as curing error in instruction placing burden of proof upon defendant in that regard. 120 A.L.R. 610.

Attorney's compensation in murder case, amount of. 143 A.L.R. 672, 844.

Inference of intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Criminal responsibility for injury or death resulting from. 23 A.L.R.2d 1401.

Causing one, by threats or fright, to leap or fall to his death. 25 A.L.R.2d 1186.

Instruction as to presumption of continuing insanity in criminal case. 27 A.L.R.2d 121.

Right of prosecution, in homicide case, to

introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased. 34 A.L.R.2d 451.

Right of accused in homicide case to cross-examine prosecution's witness as to latter's pending or completed civil action against accused arising out of same transaction. 41 A.L.R.2d 1205.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Fright or shock, homicide by. 47 A.L.R.2d 1072.

Juvenile court, homicide by juveniles within jurisdiction of. 48 A.L.R.2d 663.

Extent of premises which may be defended without retreat under right of self-defense. 52 A.L.R.2d 1458.

Druggist's criminal responsibility for death or injury in consequence of mistake. 55 A.L.R.2d 714.

Duty of trial court to instruct on self-defense, in absence of request by accused. 56 A.L.R.2d 1170.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted. 56 A.L.R.2d 1447.

Necessity of materiality of statement of place of death in indictment or information charging homicide. 59 A.L.R.2d 901.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing. 68 A.L.R.2d 903.

Admissibility on behalf of accused in homicide case of evidence that the killing was committed at victim's request. 71 A.L.R.2d 617.

Necessity of trial court charge upon motive in homicide case. 71 A.L.R.2d 1025.

Admissibility of photograph of corpse in prosecution of homicide or civil action for causing death. 73 A.L.R.2d 769.

Presumption of deliberation or premeditation from the act of killing. 86 A.L.R.2d 656.

Identification of victim as named in indictment or information. 86 A.L.R.2d 722.

Criminal liability of parent, teacher, or one in loco parentis for homicide by excessive or improper punishment of delinquent child. 89 A.L.R.2d 396, 417.

"Lying in wait," what constitutes. 89 A.L.R.2d 1140.

Manslaughter, who other than actor is liable for. 95 A.L.R.2d 175.

Presumption of deliberation or premeditation from the circumstances attending the killing. 96 A.L.R.2d 1435.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide. 98 A.L.R.2d 6.

Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 100 A.L.R.2d 769.

Admissibility of evidence as to other's char-

acter or reputation for turbulence in question of self-defense by one charged with assault or homicide. 1 A.L.R.3d 571.

Insulting words as provocation of homicide or as reducing the degree thereof. 2 A.L.R.3d 1292.

Right of accused in city courts to inspection or disclosure of evidence in possession of prosecution. 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 A.L.R.3d 181.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 A.L.R.3d 1236.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide. 11 A.L.R.3d 834.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 A.L.R.3d 832.

What amounts to negligence within meaning of statutes penalizing negligent homicide by operation of a motor vehicle. 20 A.L.R.3d 473.

Homicide by automobiles. 21 A.L.R.3d 116.

Homicide or assault as ground for disciplinary measures against attorney. 21 A.L.R.3d 887.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused of victim's corpse. 27 A.L.R.3d 1185.

Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 A.L.R.3d 589.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 A.L.R.3d 1078.

Homicide based on killing of unborn child. 40 A.L.R.3d 444.

Duty to retreat as condition of self-defense when one of the attacked is in office, or place of business or employment. 41 A.L.R.3d 584.

Modern status of rules as to burden and quantum of proof to show self-defense in homicide. 43 A.L.R.3d 221.

Homicide predicated on improper treatment of disease or injury. 45 A.L.R.3d 114.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 A.L.R.3d 397.

What constitutes attempted murder. 54 A.L.R.3d 612.

Unintentional killing of or injury to third

party during attempted self-defense. 55 A.L.R.3d 620.

Withdrawal, after provocation of conflict, with reviving right of self-defense. 55 A.L.R.3d 1000.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 279.

What constitutes termination of felony for purposes of felony-murder rule. 58 A.L.R.3d 851.

Homicide as affected by time elapsing between wound and death. 60 A.L.R.3d 1316.

Burden of proof on defense that killing was accidental. 63 A.L.R.3d 936.

Disinterment in criminal cases. 63 A.L.R.3d 1294.

Proof of live birth in prosecution for killing newborn child. 65 A.L.R.3d 413.

What constitutes "imminently dangerous" act within the homicide statute. 67 A.L.R.3d 900.

Admissibility of testimony of coroner or mortician as to cause of death in homicide prosecution. 71 A.L.R.3d 1265.

When intoxication being involuntary so as to constitute a defense of criminal charge. 73 A.L.R.3d 195.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic act directly causing fatal injury. 78 A.L.R.3d 1132.

What constitutes murder by torture. 83 A.L.R.3d 1222.

Propriety of predating manslaughter conviction on violation of local ordinance or regulation not dealing with motor vehicle. 85 A.L.R.3d 1072.

Corporation's criminal liability for homicide. 45 A.L.R.4th 1021.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 11 A.L.R.5th 497.

Adequacy of defense counsel's representation of criminal client-conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client-pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 A.L.R.5th 419.

18-4002. Express and implied malice. — Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. [I.C., § 18-4002, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 15 — 17; R.S., R.C., & C.L., § 6561; C.S., § 8210; I.C.A., § 17-1102, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924); *State v. Foley*, 95 Idaho 222, 506 P.2d 119 (1973); *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984); *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991); *State v. Weinmann*, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992); *State v. Espinoza*, 127 Idaho 194, 898 P.2d 1105 (Ct. App. 1995); *State v. Contreras*, 133 Idaho 862, 993 P.2d 625 (Ct. App. 2000).

ANALYSIS

Defendant's understanding of charge.
Differentiating between right and wrong.

Evidence.

Implied malice.

Instructions to jury.

Intent.

Premeditation.

Proof.

Sentence.

— Not excessive.

Use of deadly weapon.

Defendant's Understanding of Charge.

Where the record disclosed no statement by the district judge informing the defendant of the malice element, and there was nothing in the record refuting the defendant's allegation that his attorney also failed to advise him of the essential elements necessary to the charge of assault with intent to commit murder, there existed at least a material issue of fact whether the defendant understood the nature of the charge against him; consequently, summary dismissal of the defendant's petition for post-conviction relief was

reversed. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

Differentiating Between Right and Wrong.

From all the evidence in a murder prosecution it appears that the defendant must not be so far intoxicated as would preclude him from knowing the difference between right and wrong and being able to complete a social pattern. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Where state in murder prosecution introduced testimony to show defendant knew the difference between right and wrong at the time of the homicide and no other witness testified as to defendant's sanity, it is concluded that the defendant has the mental ability to reason and had the capacity to formulate malice aforethought. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Evidence.

In trial of defendant charged with assault with intent to commit murder the evidence must be sufficient to convince jury that assault was made with intent to commit murder, and with malice aforethought. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Where evidence showed in trial of defendant charged with attempt to commit murder that defendant pointed a loaded gun at complaining witness, who was within range of bullet fired from gun, and said "give me my cigarette lighter or I will kill you" and promptly fired when complaining witness said he didn't have the lighter was sufficient to justify verdict of guilty. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Inasmuch as the defendant took the life of deceased and did so with malice aforethought, it necessarily must follow that he is guilty of murder. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

The fact that a murder victim was stabbed 33 times was sufficient to support the jury's conclusion that the killing was done with malice. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982).

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may be presumed; it is the province of the jury to determine whether the evidence in the record only supports a conviction of voluntary manslaughter or whether there is sufficient proof of malice to justify a conviction for first-degree murder. Thus, where the evidence established that the defendant placed a loaded gun against the chest of the victim and pulled the trigger, the jury could properly have presumed that the defendant acted with malice. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Implied Malice.

Malice is implied for any deliberate and cruel act against another, however sudden, which shows an abandoned and malignant heart. *State v. Willis*, 24 Idaho 252, 132 P. 962 (1913).

Threats made by accused are inadmissible when they were made generally and not directed against deceased. *State v. Buster*, 28 Idaho 110, 152 P. 196 (1915).

The element of malice may be express or implied. *State v. Kuzmichev*, 132 Idaho 536, 976 P.2d 462 (1999).

Instructions to Jury.

Instruction that malice is to be implied when the circumstances show an abandoned and malignant heart but failing to state "or when no considerable provocation appears" is erroneous. *People v. McDonald*, 2 Idaho (Hasb.) 10, 1 P. 345 (1881).

Failure of court to follow the language of the section so as to include the word "all" before the words "circumstances of the killing show an abandoned and malignant heart" is not reversible error. *People v. McDonald*, 2 Idaho (Hasb.) 10, 1 P. 345 (1881).

Instruction that if jury believe from the evidence beyond a reasonable doubt that defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder is proper. *People v. Pierson*, 2 Idaho (Hasb.) 76, 3 P. 688 (1884).

Instruction "that if, without such provocation as is apparently sufficient to excite irresistible passion, a person shoots another, and by such shooting occasions death, although he had no previous malice or ill will toward the person shot, yet he is presumed to have had such malice at the time of the shooting, and the person shooting will be guilty of murder," will sustain a verdict of murder in the second degree. *Territory v. Evans*, 2 Idaho (Hasb.) 425, 17 P. 139 (1888); *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910).

Omission of term malice in instruction defining a killing committed while engaged in attempt to commit a felony as murder in the first degree did not mislead jury as to necessity of state to prove malice in first degree murder where other instructions given by the court defined "murder as the unlawful killing of a human being with malice aforethought," defined terms express and implied malice, and that in case of homicide committed by use of a deadly weapon the law presumed malice. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepard*, 94 Idaho 227, 486 P.2d 82 (1971).

The court did not err in submitting to the jury the issue of first degree murder where the evidence indicated clearly a deliberate, premeditated purpose to take the life of the

deceased thus establishing death by criminal means and not justifiable or excusable attack upon deceased. *State v. Burris*, 80 Idaho 395, 331 P.2d 265 (1958).

There was no prejudicial error in quoting the language of the former section in an instruction to the jury defining malice. *State v. Anstine*, 91 Idaho 169, 418 P.2d 210 (1966).

An instruction defining murder substantially in the language of § 18-4001, accompanied by other instructions defining "malice aforethought" substantially in the language of the former section and defining the terms "feloniously," "wilfully," "premeditatedly," and "deliberately," and defining the degrees of murder substantially in the language of § 18-4003, adequately distinguished between murder in the first and second degree. *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968).

Where jury is fully instructed concerning the frame of mind required, it was harmless error for the court to also instruct as to the definition of malice as found in § 18-101, even though that definition is not applicable in a murder case. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

In a murder prosecution the use of the word "malice" instead of "malice aforethought" in jury instructions was not error where word "malice" was used for the same purpose and in same manner in § 18-4006, which used word "malice" to refer to "malice aforethought" as that term was used in § 18-4001. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Instruction that malice is to be implied "when no considerable provocation appears" was not error and properly advised the jury as to the elements from which malice could be implied. *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973).

District court did not abuse its discretion in deciding not to give a jury instruction on involuntary or voluntary manslaughter as lesser offenses of first-degree murder where evidence showed that a 12 gauge shotgun was fired into an occupied room exhibiting a wanton disregard for human life which might lead a jury to infer "malice aforethought" which is an element of both first and second-degree murder but not to involuntary manslaughter; additionally there was no evidence to indicate the murder took place in the heat of passion. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), cert. denied, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Where defendant objected to language in jury instructions taken from this section, §§ 18-4001 and 18-4006 defining murder, malice and manslaughter, as incomprehensible and unnecessarily confusing, the Court of Appeals noted that until the legislature chose

to amend the language of the statutes, the court was bound by the words that the legislature had chosen for the definition of various crimes. *State v. Carsner*, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995).

Intent.

Intent of defendant to kill complaining witness was not negated as a matter of law where complaining witness was close enough to defendant to be hit by bullet fired from defendant's gun. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Where defendant pointed his gun at the victim with whom he had altercation and the gun discharged causing death, the conviction of second-degree murder was proper and the circumstances of the shooting would not support a conviction of voluntary manslaughter. *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971).

Where evidence in murder prosecution indicated that defendant armed himself while still in bar and was preparing for subsequent violent confrontation outside bar, the evidence of the crucial element of intent was not so insubstantial that the jurors could not help but have a reasonable doubt as to proof of that element; to the contrary, the evidence, and the inferences reasonably drawn from it, strongly supported the conclusion that defendant acted with malice and, accordingly, the court did not err in denying motion for a judgment of acquittal. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

Attempted first degree murder by torture, absent a specific showing of intent, is not a crime in Idaho, because first degree murder by torture does not require a specific showing of intent to sustain a conviction, but the crime of attempt does require a specific showing of intent to commit the underlying crime. *State v. Luke*, 134 Idaho 294, 1 P.3d 795 (2000).

Premeditation.

Premeditation is not an essential element of crime of assault with intent to commit murder. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Proof.

The proof of a murder in the first degree may be established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery; the requirement of "malice aforethought" is satisfied by the fact the killing was committed in the perpetration of a robbery. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Sentence.

—Not Excessive.

After considering defendant's age and the nature and circumstance of his crime, 25-year

term of confinement was not grossly disproportionate where he killed another human being by shooting the victim four times at point-blank range without any provocation, as the utter disregard for human life demonstrated in the commission of crime, coupled with the fact that it was committed against a law enforcement officer, might well have led to imposition of the death penalty or a fixed life sentence if the perpetrator had been an adult, and under circumstances, even in view of defendant's youth, court could not say that the sentence was out of all proportion to the gravity of the offense or such as to shock the conscience of reasonable people. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Use of Deadly Weapon.

In a murder prosecution, because of the use to which knife of defendant was put and results of this use, it will be classified as a deadly weapon and therefore it is to be concluded that there was both express and im-

plied malice on behalf of defendant immediately prior to the time he took the life of the deceased. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Trial court had no other alternative than to find the defendant guilty of wilful, deliberate, and premeditated killing with malice aforethought in view of the defendant's act of deliberately opening up a pocket knife, next cutting the victim's throat and then hacking and cutting until he had killed the deceased and expended himself and the imposition of the death sentence under the circumstances was not an abuse of discretion by the trial court under such facts and circumstances. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may be presumed; such a presumption may be rebutted. *State v. Rodriguez*, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983).

18-4003. Degrees of murder. — (a) All murder which is perpetrated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of willful, deliberate and premeditated killing is murder of the first degree.

(b) Any murder of any peace officer, executive officer, officer of the court, fireman, judicial officer or prosecuting attorney who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting, shall be murder of the first degree.

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age, arson, rape, robbery, burglary, kidnapping or mayhem, or an act of terrorism, as defined in section 18-8102, Idaho Code, or the use of a weapon of mass destruction, biological weapon or chemical weapon, is murder of the first degree.

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

(f) Any murder committed by a person while escaping or attempting to escape from a penal institution is murder of the first degree.

(g) All other kinds of murder are of the second degree. [I.C., § 18-4003, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 1, p. 588; am. 1977, ch. 154, § 2, p. 390; am. 1991, ch. 227, § 1, p. 546; am. 2002, ch. 222, § 4, p. 623.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 17; R.S., R.C., & C.L., § 6562; C.S., § 8211; I.C.A., § 17-1103; am. S.L. 1935, ch. 24, § 1, p. 41; am. S.L. 1969, ch. 248, § 1, p. 773, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 1 of S.L. 1977, ch. 154 is compiled as § 18-4001.

Sections 3 and 5 of S.L. 2002, ch. 222 are compiled as §§ 18-3324 and 18-7803, respectively.

Cross ref. Jury to find degree of crime, § 19-2311.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-8303, 18-8304, 18-8314, 19-2520, 19-5506, 20-525A, 33-1208, 39-1113 and 67-2916.

Cited in: *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910); *State v. Willis*, 24 Idaho 252, 132 P. 962 (1913); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973); *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981); *State v. Kaiser*, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984); *State v. Pennell*, 108 Idaho 669, 701 P.2d 289 (Ct. App. 1985); *State v. Caudill*, 109 Idaho 222, 706 P.2d 456 (1985); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985). See *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993); *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989); *State v. Brazzell*, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990); *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991); *State v. Weinmann*, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992); *State v. Pederson*, 124 Idaho 179, 857 P.2d 658 (1993); *State v. Espinoza*, 127 Idaho 194, 898 P.2d 1105 (Ct. App. 1995); *State v. Contreras*, 133 Idaho 862, 993 P.2d 625 (Ct. App. 2000); *State v. Thomas*, 133 Idaho 682, 991 P.2d 870 (Ct. App. 1999); *State v. Jenkins*, 133 Idaho 747, 992 P.2d 196 (Ct. App. 1999); *Pratt v. State*, 134 Idaho 581, 6 P.3d 831 (2000); *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

ANALYSIS

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—Erroneous Admission of Evidence.

When a criminal trial has been tainted by the erroneous admission of evidence, a conviction will nonetheless be affirmed if the appellate court concludes, beyond a reasonable doubt, that there is no reasonable possibility that the error contributed to the conviction. *State v. Eby*, 136 Idaho 534, 37 P.3d 625 (Ct. App. 2001).

—Standard of Review.

A jury verdict supported by substantial, competent evidence will not be disturbed on appeal; the standard of review on appeal requires a review of the record to determine if sufficient evidence exists and the court is precluded from substituting its judgment for that of the jury as to the credibility of witnesses, the weight of the testimony and the reasonable inferences to be drawn from the evidence. Furthermore, on appeal, where a defendant stands convicted, the evidence is to be viewed most favorably to the prosecution. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

The reviewing court will not disturb a conviction for first-degree murder if its search of the record convinces it, after viewing the evidence in a light most favorable to the prosecution, that the murder was willful, deliberate and premeditated, or that it was committed during an attempted or a successful robbery. *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985), rev'd on other grounds, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

Assault with Intent to Commit.

In trial of defendant charged with assault with intent to commit murder the evidence must be sufficient to convince jury that assault was made with intent to commit murder, and with malice aforethought. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Assault with intent to commit murder has only one punishment and does not contain two degrees. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Attempt.

Because intent is not an element of felony murder, but is an element of attempt to commit a crime, there is no such crime as attempted felony murder. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

Conviction.

Where defendant was convicted of robbery, kidnapping and the murder of a U.S. Forest Service officer shot while in pursuit of defendant, his conviction for first-degree murder did not rest solely upon subsection (b) of this section, and vacating his conviction under subsection (b), upon determining that the forest service officer was not a peace officer within the meaning of the subsection, had absolutely no effect on the jury's independent finding that defendant was guilty of first-degree murder under subsection (d) of this section, thus the conviction of first-degree murder was affirmed. *State v. Pratt*, 128 Idaho 207, 912 P.2d 94 (1996).

Degrees Undistinguished at Common Law.

At common law all murder was of the first degree and no such distinction was recognized as that incorporated in this section, designating degrees. *State v. Phinney*, 13 Idaho 307, 89 P. 634, 12 L.R.A. (n.s.) 935, 12 Ann. Cas. 1079 (1907).

Dual Juries.

The trial court did not deprive the defendant of due process by jointly trying him with his codefendant and using separate juries sitting in the same courtroom, where the codefendant testified before the defendant's jury, and the defendant had the opportunity to cross-examine him as to any statements presented through the testimony of other witnesses. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Evidence.

Where the co-defendant took the stand and counsel for defendant had full opportunity to cross-examine, defendant was not denied a fair trial because his co-defendant's confession was admitted into evidence. *State v. Bean*, 109 Idaho 231, 706 P.2d 1342 (1985).

Where the defendant admitted that she taped the victim with duct tape prior to his murder by stabbing, the testimony of the state's pathologist that the manner in which the tape was affixed to the victim's face would have prevented any breathing was relevant to provide a complete description of the crime and to show the defendant's state of mind and

intent. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

There was sufficient evidence to support the jury finding of the existence of a deliberate and premeditated killing beyond a reasonable doubt, where upon his arrest, the defendant told the arresting officer that he had entered his ex-wife's home with a concealed knife, before killing his ex-wife, the defendant told her that he was going to kill her, and additional testimony indicated that the defendant had attempted to purchase a gun for the purpose of killing his ex-wife. *State v. Kirkwood*, 111 Idaho 623, 726 P.2d 735 (1986).

—Confession.

Where the defendant was questioned for five minutes about the location of the murder victim's car and she then agreed to make a confession, at which point she was read her Miranda rights, the defendant was not coerced into giving a statement, and the confession was admissible. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Under the totality of the circumstances, defendant's confession was informed and voluntary, and the officer was not required to terminate questioning or seek a clarification of whether defendant did in fact wish to invoke his right to remain silent when defendant began to say "no more" in response to the officer's questions. *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000).

—Photographs.

Although the prosecutor's purported reason for admitting the photographs of the murder victim's slit throat was to assist the expert witness with his testimony, and in retrospect, the photographs were not used for that purpose, they were nonetheless relevant evidence where even though the cause of death was drowning, it was clear that the victim had had her throat slit and that the throat slitting had either preceded the drowning or had happened at the same time. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Photographs of the victim in a prosecution for homicide, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, are, in the discretion of the trial court, admissible in evidence as an aid to the jury in arriving at a fair understanding of the evidence. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Felony Murder and Firearm Enhancement.

Phrase "in the perpetration of" a crime is synonymous with the words "while commit-

ting" a crime in Idaho Code § 19-2520. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Felony Murder Rule.

Where victim's death was part of a stream of events which began on the evening on which the defendants entered the victim's home and ended the following day when the victim's possessions were removed from the home, the jury's instruction on the felony murder rule was correct. *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870, 107 S. Ct. 239, 93 L. Ed. 2d 164 (1986).

Subsection (d) of this section, the felony murder rule, does not include any element of intent; a defendant who participates in a felony can be held liable for the death of any person killed during the commission of the felony, regardless of the individual defendant's intent that a death occur. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Circumstances of the shooting of a store clerk during an attempted robbery in which defendant claimed the shooting was accidental, provided the requisite "intent" for felony murder. *State v. Cambron*, 118 Idaho 624, 798 P.2d 469 (Ct. App. 1990).

In order to permit a conviction for felony murder for the aggravated battery of a child under twelve years of age, a jury need only be instructed that the state needs to prove, beyond a reasonable doubt, that the perpetrator had the general intent to commit the underlying predicate felony of aggravated battery. *State v. Carlson*, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000).

The general rationale behind the felony murder rule is that the intent to commit the felony substitutes for the malice requirement, and where the intent to commit the felony does not arise until after the homicide has occurred, the rationale behind the rule no longer applies. *State v. Cheatham*, 134 Idaho 565, 6 P.3d 815 (2000).

Any murder committed during the perpetration of certain felonies, including attempted robbery, is murder in the first degree under subsection (d), and any participant in the predicate felony can be held accountable for first degree murder for any death that occurred during the commission of the felony, regardless of whether that individual directly participated in the killing or expected or intended a death to occur. *State v. Eby*, 136 Idaho 534, 37 P.3d 625 (Ct. App. 2001).

First Degree Murder.

Construing this section with § 18-4001, murder committed by means of poison is not murder in the first degree unless element of malice aforethought is present; mere fact that

killing has been accomplished by means of poison does not of itself establish "malice aforethought." *State v. Phinney*, 13 Idaho 307, 89 P. 634, 12 L.R.A. (n.s.) 935, 12 Ann. Cas. 1079 (1907).

A killing in attempting to commit robbery is murder in the first degree. *People v. Mooney*, 2 Idaho (Hasb.) 17, 2 P. 876 (1888); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Proof that murder was committed in perpetration of, or attempt to perpetrate, robbery brings case within the definition of murder in the first degree, and such proof supplies the place of proof of deliberation and premeditation. *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911).

Where the proof establishes that the killing was committed in the perpetration or attempt to perpetrate one of the felonies mentioned in this section, deliberation and premeditation are implied and need not be otherwise proven. *State v. Reding*, 52 Idaho 260, 13 P.2d 253 (1932).

Evidence that two bedrooms had been ransacked, contents of dressing table and bureau had been scattered about and purses were open and empty was sufficient to go to jury on question of whether or not the killing had occurred in the perpetration or attempted perpetration of a robbery. *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947).

Where defendants entered store for purpose of committing armed robbery, and one defendant displayed a gun and stated it was a holdup but retreated as proprietor advanced with meat cleaver and after giving warning shots fired again and killed proprietor the defendants were guilty of first degree murder. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Regardless of the existence or nonexistence of any intent to fire a weapon, the killing of a person during the commission of a felony would trigger the felony-murder rule. *Still v. State*, 97 Idaho 375, 544 P.2d 1145 (1976).

Where a review of the record indicated very substantial evidence, direct and circumstantial, connecting defendant to the victim, the murder weapon and the murder scene and pointing to the defendant's guilt of the crime of premeditated first-degree murder in the stabbing death of defendant's drug supplier, defendant's allegations of insufficiency of evidence were unfounded. *State v. Major*, 105 Idaho 4, 665 P.2d 703 (1983).

The proof of a murder in the first degree may be established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery; the requirement of "malice aforethought" is satisfied by the fact the killing was committed in the perpetration of a robbery. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989),

cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Statutory aggravating factor in Idaho Code § 19-2515(h)(9) is appropriate only to those cases where a police officer is killed by reason of the performance of an official duty; therefore, a district court did not err by imposing a life sentence in a first-degree murder case because the evidence showed that the officer was not killed because of any interaction or relationship with defendant. *State v. Yager*, — Idaho —, 85 P.3d 656 (2004).

Guilty Pleas.

Where the defendant agreed to plead guilty to the charge of first-degree murder in exchange for the prosecutor's agreement to dismiss pending charges of robbery, grand larceny, and illegal possession of a firearm and to refrain from requesting the death penalty, such guilty plea was properly accepted by the court where the judge made a full record concerning the matters governed by I.C.R. 11(c), pertaining to the acceptance of a guilty plea and took special care to ensure that the defendant understood the elements of first-degree murder, including premeditation, even though the defendant denied premeditation, since there was a strong factual basis for pleading guilty to the offense as charged, and the plea was entered knowingly, voluntarily and intelligently. *State v. Hoffman*, 108 Idaho 720, 701 P.2d 668 (Ct. App. 1985).

Where defendant entered plea of guilty pursuant to written plea agreement to charge of second degree murder and after presentence report was received but prior to sentencing she moved to withdraw her guilty plea, where record showed that defendant understood the nature of the charge and the evidence against her, understood that the possible penalty was an indeterminate ten years to life, understood the nature of an Alford plea, had been adequately informed regarding the intent element of second degree murder, and entered her guilty plea intelligently and voluntarily, district court did not err in concluding that defendant presented no justifiable reason for granting motion to withdraw guilty plea. *State v. Hansen*, 120 Idaho 286, 815 P.2d 484 (Ct. App. 1991).

Included Offense.

Where all the elements required to sustain a conviction of robbery were also within the elements needed to sustain a conviction of felony murder, robbery was a lesser included offense of felony-murder, and, therefore, the robbery conviction merged as a lesser included offense of the felony murder conviction. *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986).

Indictment and Information.

Premeditated killing must be charged in order to sustain conviction of murder in the

first degree. *People v. O'Callaghan*, 2 Idaho (Hasb.) 156, 9 P. 414 (1886).

Indictment charging a wounding done with felonious intent, in consequence of which death resulted, charges murder without charging an intent to kill. *Territory v. Evans*, 2 Idaho (Hasb.) 425, 17 P. 139 (1888).

It is not requisite or essential that the words defining degrees of murder should be set forth in indictment to constitute a good indictment for murder in first degree. *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895).

Where information charges murder in language of the statute only, person charged may be found guilty of only murder in one of the degrees specified in the statute. *In re McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913).

The information was sufficient to charge defendant with felony murder where, rather than using the word murder, the information charged that the victim died in the commission of a robbery, because the words used in an information need not precisely track the language of the statute defining an offense. *State v. Lundquist*, 134 Idaho 831, 11 P.3d 27 (2000).

Instruction to Jury.

On a trial for murder it is the duty of court to give an instruction to jury, if requested, that they can find defendant guilty of a less grade of offense than murder in the first degree, if warranted by the evidence; and refusal to give such instruction is error. *People v. Dunn*, 1 Idaho 74 (1866).

Instruction that death caused by attempt to cause unnatural abortion when not necessary to save woman's life constitutes crime of murder in the second degree, or manslaughter, is erroneous. *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901).

In prosecution for murder this instruction was given: "It is claimed, that this is murder in the first degree, as being unlawful, malicious, wilful, deliberate, and premeditated. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other or how quickly they may be followed by the act of killing." It was held that omission of the word "malice" in the last sentence did not vitiate instruction. *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903).

An instruction that the state contended that a killing was wilful, deliberate and premeditated murder, and that it was committed

in the perpetration of, or attempt to perpetrate, robbery, was not error, though the court did not instruct that defendant denied the robbery or attempted robbery, since the court gave a general instruction that it was incumbent on the state to prove every material allegation of the information and that defendant was presumed to be innocent until the contrary was proven beyond a reasonable doubt. *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947).

There was no prejudicial error in quoting the language of the former section in an instruction to the jury stating the degrees of murder, although there was no evidence of "lying in wait, poison, torture, arson, rape, robbery, burglary, kidnapping, or mayhem." *State v. Anstine*, 91 Idaho 169, 418 P.2d 210 (1966).

An instruction defining murder substantially in the language of § 18-4001, accompanied by other instructions defining "malice aforethought" substantially in the language of § 18-4002 and defining the terms "feloniously," "wilfully," "premeditatedly," and "deliberately," and defining the degrees of murder substantially in the language of the former section, adequately distinguished between murder in the first and second degrees. *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968).

An instruction defining murder substantially in the language of § 18-4001, accompanied by other instructions defining "malice" substantially in the language of § 18-4002 and defining "wilfulness," "deliberation," and "premeditation," and defining the degrees of murder, adequately distinguished between murder in the first and second degrees. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

The trial court was correct in refusing to give the defendant's requested instruction that a burglary and a murder must be part of a continuous action closely related in time, place, and causal relation before the murder can be found to be in the perpetration of the felony. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

A jury need not be instructed in the esoteric distinctions between general and specific intent, and where the instructions to the jury repeatedly emphasized that before defendant could be convicted he must have acted with the intent to kill victim, the jury instructions, when read and considered as a whole, adequately instructed the jury concerning the elements of murder in the first and second degree and manslaughter, and the distinctions between each, including intent. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

District court did not abuse its discretion in deciding not to give a jury instruction on involuntary or voluntary manslaughter as

lesser offenses of first-degree murder where evidence showed that a 12 gauge shotgun was fired into an occupied room exhibiting a wanton disregard for human life which might lead a jury to infer "malice aforethought" which is an element of both first and second-degree murder but not to involuntary manslaughter; additionally there was no evidence to indicate the murder took place in the heat of passion. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), cert. denied, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Killing During Robbery.

Where, not only were the murders in question committed in the course of a robbery, but (1) there was substantial evidence showing specific intent to cause both deaths, even if the robbery had not occurred, and (2) there was substantial evidence showing that the murders were wilful, deliberate and premeditated, the robbery did not provide the means of convicting defendant of premeditated first degree murder, and therefore, the robbery was not a lesser included offense of that crime and was not merged with that conviction. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992).

The Supreme Court reversed the district judge's order reducing the felony murder charges to second degree murder, because, although the district judge correctly determined that the intent to commit the underlying felony must exist prior to the homicide, the state had presented sufficient evidence to support submitting the issue of intent to a jury. *State v. Cheatham*, 134 Idaho 565, 6 P.3d 815 (2000).

Malice.

Where a defendant uses a deadly weapon against the person of another in a deadly and dangerous manner, the element of malice may be presumed; it is the province of the jury to determine whether the evidence in the record only supports a conviction of voluntary manslaughter or whether there is sufficient proof of malice to justify a conviction for first-degree murder. Thus, where the evidence established that the defendant placed a loaded gun against the chest of the victim and pulled the trigger, the jury could properly have presumed that the defendant acted with malice. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Where a defendant uses a deadly weapon in a deadly manner, the element of malice can be presumed. *State v. Ziegler*, 107 Idaho 1133, 695 P.2d 1272 (Ct. App. 1985).

Where the victim had ligature marks on her neck and a plastic bag pulled and tied over her head, the jury could reasonably conclude that the evidence represented the requisite malice aforethought to find the defendant guilty of second degree murder. *State v. Kuzmichev*, 132 Idaho 536, 976 P.2d 462 (1999).

Motive.

Although the former section made no mention of "motive," it was the prerogative of the prosecution to introduce evidence of "motive" and once such evidence was introduced into the case, it would have been proper for the trial court to instruct the jury with respect to that issue. *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970).

Premeditation.

Premeditation is not an essential element of crime of assault with intent to commit murder. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Officer.

Premeditation does not require an appreciable space of time between the intention to kill and the killing, but they may be as instantaneous as two successive thoughts of the mind. *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967).

To establish the crime of murder in the first degree, direct evidence of the elements of deliberation and premeditation is not required, those elements being capable of inference from the proof of such facts and circumstances as will furnish a reasonable foundation for such inference where the evidence is not in law insufficient, the determination of the matter rests within the exclusive province of the trier of fact. *State v. Foley*, 95 Idaho 222, 506 P.2d 119 (1973).

Direct evidence of a deliberate and premeditated purpose to kill is not required; such a purpose may be inferred from the facts and circumstances of the killing. Further, premeditation does not require an appreciable space of time between the intention to kill and the killing — they may be instantaneous as two successive thoughts of the mind. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Neither § 19-510 nor § 19-5101(d) apply to the relevant terms enumerated in subsection (b) of this section. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

A law enforcement officer of the United States Forest Service, who was killed in a shoot-out on private land, was not a peace officer "acting in the lawful discharge of his duty" as contemplated by subdivision (b) of this section. *State v. Pratt*, 125 Idaho 594, 873 P.2d 848, cert. denied, 513 U.S. 1005, 115 S. Ct. 521, 130 L. Ed. 2d 426 (1994).

Second Degree Murder.

Criminal operation resulting in death, an abortion not being necessary to save life of the woman, is murder in second degree. *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901).

Conviction of second degree murder. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).

Malice aforethought is necessary element of murder whether it be first or second degree, but premeditation, as used in this section, is not included in murder of the second degree. *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922).

Intent to take life or a mental state of having an abandoned and malignant heart is an essential ingredient of second degree murder. *State v. Van Vlack*, 57 Idaho 316, 65 P.2d 736 (1937).

The elements of the crime of murder in the second degree are: (a) an unlawful killing, (b) the intent to kill, and (c) malice. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

Sentence.

Fifteen-year sentence given defendant upon plea of guilty to second degree murder was not an abuse of court's discretion, being well within the statutory limits and consistent with the plea bargain. *State v. Bradley*, 98 Idaho 918, 575 P.2d 1306 (1978).

Section 18-4004 requires, upon conviction for first-degree murder, punishment of either death or a life sentence. The trial judge may not impose a lesser, fixed term sentence; thus, the 25 year fixed sentence the defendant received was illegal, and was therefore vacated and remanded to the district court to impose a legal sentence. *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985), rev'd on other grounds, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

A 15 year fixed term for attempted second degree murder and a consecutive indeterminate ten-year term for assault with intent to commit rape was reasonable where psychologist concluded that defendant was not a good candidate for verbal psychotherapy and even though defendant did not have a long prior record, the record he had was quite serious. *State v. Fenstermaker*, 122 Idaho 926, 841 P.2d 456 (Ct. App. 1992).

A fifteen-year determinate sentence for attempted murder and a consecutive 35-year sentence, with fifteen years determinate for robbery was not excessive, where the character of the offense was vicious and unprovoked involving infliction of multiple stab wounds on a helpless victim. *State v. Mitchell*, 124 Idaho 374, 859 P.2d 972 (Ct. App. 1993).

Sentence imposed upon co-defendant of two life terms without possibility of parole for guilty plea to two counts of murder in the first

degree was not excessive nor an abuse of discretion where crimes of defendant were particularly heinous and egregious and defendant's attitudes, behaviors and characteristics demonstrated a contempt for the law and the order of society, as well as an utter disregard for human life. *State v. Johnson*, 127 Idaho 279, 899 P.2d 989 (Ct. App. 1995).

After considering defendant's age and the nature and circumstance of his crime, 25-year term of confinement was not grossly disproportionate where he killed another human being by shooting the victim four times at point-blank range without any provocation, as the utter disregard for human life demonstrated in the commission of crime, coupled with the fact that it was committed against a law enforcement officer, might well have led to imposition of the death penalty or a fixed life sentence if the perpetrator had been an adult, and under circumstances, even in view of defendant's youth, court could not say that the sentence was out of all proportion to the gravity of the offense or such as to shock the conscience of reasonable people. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Where the district court considered defendant's young age, lack of intellect and childhood abuse as mitigating factors, yet concluded that the heinous nature of the crime and poor prognosis for rehabilitation required that court be attentive to the sentencing goals of punishment and deterrence, conviction and unified life sentence with minimum 29 years for first degree murder of his two and one-half year old stepson was affirmed. *State v. Walker*, 129 Idaho 409, 925 P.2d 413 (Ct. App. 1996).

Where, after binding victim (an acquaintance), beating and humiliating him, defendant put his gun against victim's head and shot him and then burned the body and buried him in a shallow grave and after being arrested for first degree murder, defendant pled guilty to second degree murder, sentence of indeterminate life sentence, with a minimum period of confinement of twenty-five years under the facts of the case was not disproportionate to the crime committed and because of the particularly heinous nature of the crime, and the fact that the minimum period of confinement of 25 years was the probable duration of confinement, such sentence was not excessive. *State v. Robertson*, 130 Idaho 287, 939 P.2d 863 (Ct. App. 1997).

Where the district court concluded that punishment, deterrence, and the protection of society greatly outweighed any consideration of rehabilitation, the gravity of the offense in the instant case was sufficiently egregious to justify the district court's conclusion, and the district court did not abuse its discretion in imposing a fixed life sentence for second de-

gree murder. *State v. McKnight*, 135 Idaho 440, 19 P.3d 64 (Ct. App. 2000).

Sufficiency of Evidence.

Where the evidence showed that defendant and his wife had contemplated divorce and had separated, that defendant had picked up his shotgun at his cabin outside of town, and that on the fatal evening his truck was seen outside the deceased's home amid loud demands by a male voice for entry, and later a voice, identified as his, reported the homicide anonymously, the jury had sufficient circumstantial evidence from which to infer that the defendant was guilty of the murder. *State v. Fenley*, 103 Idaho 199, 646 P.2d 441 (Ct. App. 1982).

Where the evidence showed that the defendant had previously threatened and mistreated the eight-month-old murder victim, that the death could only have been caused by several blows to the head of extraordinary force, and that the defendant was at the scene of the crime and refused to aid the victim, the evidence was sufficient to uphold the jury's finding that the killing was premeditated and deliberate. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

Where the defendant entered a bar armed with a loaded revolver, confronted his wife and the man she was speaking to at the bar, and very few words were exchanged before the defendant began firing his weapon, the jury could easily have concluded that the defendant entered the bar with the intent to kill or that the intent was formed on his finding his wife in the company of another man; thus, there was sufficient evidence of malice aforethought to sustain the verdict of second degree murder. *State v. Valdez-Abrejo*, 108 Idaho 79, 696 P.2d 930 (Ct. App. 1985).

Given the totality of the evidence and the overwhelming nature of the evidence properly admitted, the admission into evidence of the various physical items, such as a straight edge razor, guns and knives, did not constitute reversible error because it was harmless beyond a reasonable doubt. *State v. Bean*, 109 Idaho 231, 706 P.2d 1342 (1985).

There was competent substantial evidence to support defendant's conviction for the first degree murder of a bail bondsman, because the bondsman had been looking for defendant for several months prior to the shooting, defendant showed his desire to evade legal action against him, the evidence showed that defendant removed bags from his hands after being taken into custody, and the jury could find from the fact that the pipe lying next to the bondsman's body had no fingerprints on it that defendant had put it there to support his claim of self-defense. *State v. Sheahan*, — Idaho —, 77 P.3d 956 (2003).

Defendant's first-degree murder conviction

was proper where there was overwhelming evidence against defendant and he failed to show that the setting of the trial was inherently prejudicial; further, the State asserted no facts to show any prior interaction between defendant and the victim that might have explained defendant's actions which were directed at the victim personally and the district court's finding that the victim's mere status as a police officer was the basis for her murder was thus insufficient to support a conclusion that the aggravating factor was proven beyond a reasonable doubt. *State v. Yager*, — Idaho —, 85 P.3d 656 (2004).

Testimony.

In a prosecution for first-degree murder which resulted in conviction for second-degree murder, testimony of witness that photograph of red pill looked similar to red pill which defendant took in a bar shortly before leaving and killing two men was insufficient predicate to support answer to hypothetical question posed to psychiatrist witness who identified drug pictured in photograph. *State v. Birrueta*, 101 Idaho 915, 623 P.2d 1292 (1981).

Torture Murder.

—Intent.

Section 18-4001 provides that, irrespective of proof of intent to cause suffering, the infliction of extreme and prolonged acts of brutality is torture, and torture causing death shall be deemed the equivalent of intent to kill; therefore, the infliction of extreme and prolonged acts of brutality not accompanied by proof of intent to cause suffering, or by proof of executing vengeance, or by proof of extortion, or by proof of satisfying a sadistic inclination, is second degree torture murder. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Second degree murder by torture, i.e., brutality torture murder, without a demonstration of intent as provided in this section, is a lesser included offense of first degree torture murder. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

"Pain torture murder" is always in the category of first degree inasmuch as this section includes "torture, when torture is inflicted with the intent to cause suffering," but the intent to cause suffering need not be established where the charge is that the defendant possessed the intent to execute vengeance, to extort something from the victim, or to satisfy a sadistic inclination. *State v. Tribe*, 126 Idaho 610, 888 P.2d 389 (Ct. App. 1994).

—Jury Instruction.

A jury instruction as to a charge of first degree torture murder should state that first degree murder by torture consists of death of

the victim caused by the intentional infliction of extreme and prolonged pain with the intent to cause suffering, or the death of the victim caused by the infliction of extreme and prolonged acts of brutality with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy a sadistic inclination. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Verdict.

Where evidence showed in trial of defendant charged with attempt to commit murder that defendant pointed a loaded gun at complaining witness, who was within range of bullet fired from gun, and said "give me my cigarette lighter or I will kill you" and promptly fired when complaining witness said he didn't have the lighter was sufficient to justify verdict of guilty. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Trial court had no other alternative than to find the defendant guilty of wilful, deliberate, and premeditated killing with malice aforethought in view of the defendant's act of deliberately opening up a pocket knife, next cutting the victim's throat and then hacking and cutting until he had killed the deceased and expended himself and the imposition of the death sentence under the circumstances was not an abuse of discretion by the trial court under such facts and circumstances. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Inasmuch as the defendant took the life of deceased and did so with malice aforethought, it necessarily must follow that he is guilty of murder. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Collateral References. See § 18-4001 Collateral References.

Intent to aid and abet perpetrator, or entering into his design, as necessary to make one present at homicide without preconcert or conspiracy, criminally responsible. 12 A.L.R. 277.

Admissibility of dying declaration with respect to transaction prior to homicide. 14 A.L.R. 757.

Homicide by unlawful act aimed at another. 18 A.L.R. 917.

Criminal responsibility of peace officers for killing one who they wished to investigate or identify. 18 A.L.R. 1368; 61 A.L.R. 321.

Instruction as to lesser degree of crime, duty of court as to, where statute fixes degree of homicide in perpetration of felony. 21 A.L.R. 628; 27 A.L.R. 1097; 102 A.L.R. 1019.

Entrapment to attempt to commit murder. 66 A.L.R. 504; 86 A.L.R. 263.

Amendment of verdict to correct defect in omitting to find degree or nature of crime, reassembling jury after discharge for purpose of. 66 A.L.R. 557.

Intoxication as affecting deliberation and premeditation. 79 A.L.R. 904.

Arson, necessity of intent to kill to bring death resulting from, within statute making homicide in perpetration of felony murder in first degree. 87 A.L.R. 414.

Escape from scene of crime, homicide by companion of defendant while attempting to make, as murder in first degree. 108 A.L.R. 847.

Instructions, applying rule of reasonable doubt as to intent or malice as curing error in instruction placing burden of proof upon de-

fendant in that regard. 120 A.L.R. 610.

Inference of intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Pregnancy as element of offense of attempt to procure a miscarriage or of homicide predicated in such attempt. 46 A.L.R.2d 1393.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Homicide as affected by time elapsing between wound and death. 60 A.L.R.3d 1316.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

18-4004. Punishment for murder. — Subject to the provisions of sections 19-2515 and 19-2515A, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty as required under the provisions of section 18-4004A, Idaho Code, and provided further that whenever the death penalty is not imposed the court shall impose a sentence. If a jury, or the court if a jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of the death penalty would be unjust, the court shall impose a fixed life sentence. If a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life. [I.C., § 18-4004, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 2, p. 588; am. 1977, ch. 154, § 3, p. 390; am. 1986, ch. 232, § 2, p. 638; am. 1998, ch. 96, § 1, p. 343; am. 2003, ch. 19, § 1, p. 71; am. 2003, ch. 136, § 1, p. 394.]

Compiler's notes. This section was amended by two 2003 acts which appear to be compatible and have been compiled together.

The 2003 amendment by Ch. 19, § 1, re-wrote the section to add language relating to the jury or the court finding a statutory aggravating circumstance beyond a reasonable doubt.

The 2003 amendment by Ch. 136, § 1, inserted "and 19-2515A" near the beginning of the section, and made a stylistic change.

A former section, which comprised Cr. & P. 1864, § 17; R.S., & R.C., § 6563; am. S.L. 1911, ch. 68, § 1, p. 190; reen. C.L., § 6563; C.S., § 8212; I.C.A., § 17-1104, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

Section 3 of S.L. 1986, ch. 232 is compiled as § 19-2513.

Section 2 of S.L. 2003, ch. 136, is compiled as § 19-2126.

Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 29-2520C or 29-2520D, Idaho Code."

Title of 1986 Act. Section 1 of S.L. 1986, ch. 232 read: "This act shall be known as the

‘Unified Sentencing Act of 1986.’”

Section 8 of S.L. 1977, ch. 154 declared an emergency. Approved March 28, 1977.

Section 7 of S.L. 2003, ch. 19 declared an emergency. Approved February 13, 2003.

Section 6 of S.L. 2003, ch. 136 declared an emergency. Approved March 27, 2003.

Cited in: *State v. De La Paz*, 106 Idaho 924, 684 P.2d 326 (Ct. App. 1984); *Lindquist v. Gardner*, 770 F.2d 876 (9th Cir. 1985); *State v. Nellsch*, 110 Idaho 594, 716 P.2d 1366 (Ct. App. 1986); *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986); *State v. Sanders*, 112 Idaho 599, 733 P.2d 820 (Ct. App. 1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Flora*, 115 Idaho 397, 766 P.2d 1278 (Ct. App. 1988); *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989); *State v. Jagers*, 117 Idaho 559, 789 P.2d 1150 (Ct. App. 1990); *Bean v. State*, 119 Idaho 632, 809 P.2d 493 (1991); *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991); *State v. Kersey*, 121 Idaho 636, 826 P.2d 1348 (Ct. App. 1992); *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993); *State v. Shanahan*, 133 Idaho 896, 994 P.2d 1059 (Ct. App. 1999); *State v. Maynard*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 13 (Feb. 11, 2004).

ANALYSIS

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— Analysis of co-defendant's sentences.

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— Who may fix.

Validity of sentence.

Certainty of Verdict.

Verdict of murder in first degree and fixing penalty at “execution” is not uncertain, as

punishment indicated is death. *State v. Ramirez*, 33 Idaho 803, 199 P. 376 (1921).

Constitutionality.

This section is constitutional. *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937).

This state's capital sentencing scheme does not violate the state and federal Constitutions because of its failure to require that a jury, not the judge, impose a sentence of death. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986); *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Death Penalty.

The version of this section in effect at the time defendant was sentenced to death in February, 1976, which required that “every person guilty of murder in the first degree ... suffer death,” was unconstitutional under *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979) (decision prior to 1977 amendment).

Where a defendant was found guilty of first-degree murder, under the version of this section in effect in 1976, which mandated the death penalty, and that sentence could not be constitutionally imposed, the case had to be remanded to the district court for resentencing to any punishment permitted for the conviction of the lesser included offense of second-degree murder, of which he was also necessarily found guilty. *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979) (decision prior to 1977 amendment).

The death penalty is not an unduly severe punishment for an aider and abettor to a murder when that person intends that a killing take place; accordingly, where there was no doubt from the evidence that defendant intended that victim be killed in order to conceal another murder, which she witnessed, the death penalty was appropriate. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

Where according to the jury verdict, the defendant did not personally commit the crime of murder, but aided and abetted the commission of a felony murder, the defendant not only reported the crime to the police but insisted upon taking them to the crime scene even when they disbelieved his story, he did not have a history of violent criminal conduct, and at the time of the crime, he was 18 years old and his mental age was 13.8 years, the death sentence as applied to the defendant was excessive. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Where both the trial judge and the jury found that the defendant intentionally participated in a killing while perpetrating a felony, there was no merit to the defendant's contention that the imposition of the death penalty was constitutionally impermissible under the mandate of *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3363, 73 L. Ed. 2d 1140 (1982), which held that the Eighth Amendment of the United States Constitution forbids the imposition of the death penalty against one who neither took life, attempted to take life, nor intended to take life. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

In prosecution for first degree murder where at arraignment court informed defendant the maximum punishment he could receive would be imprisonment for life, or death, and after he was found guilty, court required state to provide notice whether it would seek the death penalty and state filed a negative response and there was no discussion of the death penalty as a possible sentence and both the state and defendant's counsel argued the merits of concurrent, indeterminate life sentences and consecutive indeterminate life sentences, but made no reference to the death penalty, and trial judge at end of hearing stated that he considered defendant's testimony unworthy of belief and the seriousness of the crime warranted more severe punishment than that which the state had recommended and he described the options of punishment available to the court including the indeterminate life sentence recommended by the state or a fixed life sentence, and then sentenced defendant to death, defendant did not have adequate notice that judge might sentence him to death to satisfy the requirements of the due process clause of the 14th amendment. *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991).

Where in sentencing defendant convicted of murder and sentenced to death, judge found defendant did not instigate fight with the victim, but victim without provocation attacked him, and while he was initially justified in protecting himself, after victim was helpless, defendant killed him, by the murder itself or the circumstances surrounding its commission defendant did not demonstrate that he was a cold-blooded pitiless killer and thus such limited construction of § 19-2515(g)(6) (now (h) (6)) was unconstitutionally vague. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991).

Where judge, in trial of defendant convicted of murder and sentenced to death, failed to indicate that he found specific intent beyond a reasonable doubt before applying § 19-2515(g)(7)(now (h) (7)), petitioner for habeas

corpus was entitled to release if judge at resentencing applied the aggravating circumstances under this section without making a finding of specific intent. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991).

Denial of Guilt.

A court may consider a denial of guilt in determining whether a defendant has taken the first necessary step towards rehabilitation, although a refusal to admit guilt usually should not be given much weight. *State v. Waddell*, 119 Idaho 238, 804 P.2d 1369 (Ct. App. 1991).

Discretion of Trial Court.

The trial court had no other alternative than to find the defendant guilty of wilful, deliberate, and premeditated killing with malice aforethought in view of the defendant's act of deliberately opening up a pocket knife, next cutting the victim's throat and then hacking and cutting until he had killed the deceased and expended himself and the imposition of the death sentence under the circumstances was not an abuse of discretion by the trial court under such facts and circumstances. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957).

Where the trial evidence supported the findings that the defendant carefully planned the killing, carried out the killing, and bragged about committing the murder and where the defendant acknowledged that no additional information was presented to support his Rule 35 motion, the district court's imposition of a fixed life sentence and the subsequent denial of defendant's motion for reduction of the sentence was not an abuse of the court's discretion. *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

Court did not abuse its discretion in sentencing defendant to 45 years where the details of the crime were shocking, he had a lengthy criminal history, and testimony established that he posed a threat to others. *State v. Johnson*, 136 Idaho 701, 39 P.3d 641 (Ct. App. 2001).

Due Process.

A defendant in a first-degree murder trial was not denied due process because the state did not formally notify him that it was seeking the death penalty or forewarn him as to which aggravating circumstances it would seek to prove beyond a reasonable doubt at the sentencing hearing where, upon pleading guilty to a charge of first-degree murder, the defendant was informed that he could be sentenced to death or to a determinate or indeterminate sentence of life imprisonment and the record reflected that the court made the sentencing possibilities abundantly clear to the defendant more than once during the proceedings and at each point in the proceed-

ings where the plea of the defendant was discussed. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Effect on Capacity of Jurors.

Person with conscientious scruples against capital punishment is not qualified to sit as juror where first degree murder is charged. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

Trial court did not err in permitting state to challenge six veniremen for implied bias in trial of defendants for first degree murder where veniremen challenged stated they could not vote for death penalty even though they could and would determine guilt or innocence of defendants. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Although it was error for the district court to have excluded veniremen opposed to capital punishment, because the jury returned a verdict of murder in the second degree, which at once precluded their recommending the death penalty, such error was harmless. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Imposition of sentence to life imprisonment upon defendant who pleaded guilty to charge of first degree murder even though his accomplice did the actual killing would not be set aside absent an abuse of discretion by the trial court. *State v. Atwood*, 95 Idaho 124, 504 P.2d 397 (1972).

It was not error for the trial court to dismiss jurors for cause when those jurors had declared that due to their strong feelings against the death penalty, they would vote not to convict no matter what the evidence showed. *State v. Creech*, 99 Idaho 779, 589 P.2d 114 (1979).

Guilty Plea.

Where defendant entered plea of guilty pursuant to written plea agreement to charge of second degree murder and after presentence report was received but prior to sentencing she moved to withdraw her guilty plea, where record showed that defendant understood the nature of the charge and the evidence against her, understood that the possible penalty was an indeterminate ten years to life, understood the nature of an Alford plea, had been adequately informed regarding the intent element of second degree murder, and entered her guilty plea intelligently and voluntarily, district court did not err in concluding that defendant presented no justifiable reason for granting motion to withdraw plea. *State v. Hansen*, 120 Idaho 286, 815 P.2d 484 (Ct. App. 1991).

—Breach.

Where defendant entered a plea of guilty pursuant to written plea agreement to a

charge of second degree murder of her husband under § 18-4003(g) and in such agreement prosecutor agreed not to seek a sentence in excess of 20 years and not to produce aggravating evidence at sentencing except to rebut any mitigating evidence put on by defendant, prosecutor's action during sentencing hearing of reading portions of love letters written by defendant to male inmate while both were incarcerated in the county jail, did not constitute a breach of the plea agreement since the information was already a part of the record, the prosecutor's comments were argument and not necessarily fact and they were presented as rebuttal to arguments made by defendant's attorney regarding defendant's remorse over the death of her husband. *State v. Hansen*, 120 Idaho 286, 815 P.2d 484 (Ct. App. 1991).

Indeterminate Life Sentence.

One convicted of first degree murder may be sentenced to an indeterminate life sentence and if the sentence is for indeterminate life, § 20-223, setting forth powers of the state board of correction, prohibits release on parole until ten years have been served; nevertheless, a sentence for a fixed term of ten years is in no sense of the phrase a life sentence. *State v. Wilson*, 107 Idaho 506, 690 P.2d 1338 (1984).

If, in light of the facts, the sentence is reasonable, the court then considers whether the period of confinement under the sentence is reasonable. Where defendant was sentenced to an indeterminate term of 15 years for manslaughter and to a consecutive indeterminate life term for first degree murder, a period of confinement for at least 15 years was not unreasonable. *State v. Plumley*, 109 Idaho 369, 707 P.2d 480 (Ct. App. 1985).

An indeterminate life sentence imposed for second degree murder was not an abuse of discretion where the defendant had one previous felony conviction for assault with a deadly weapon involving the attempted shooting of a police officer, and three misdemeanor convictions, and had serious problems with alcohol abuse, and where although he appeared to be stable, he was considered to be a very dangerous person whose violent behavior could be triggered by a single drink. *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985).

In a conviction for second degree murder, the district court was constrained to pronounce an overall sentence that could not be less than ten years. While the district court had to pronounce some minimum period of incarceration, the length of the mandatory minimum component was properly determined solely by the exercise of the court's sound discretion; thus an indeterminate life sentence with a minimum confinement period

of 12 years was upheld upon appeal. *State v. Paul*, 118 Idaho 717, 800 P.2d 113 (Ct. App. 1990).

An indeterminate life sentence, with a minimum period of confinement of 24 years, was an appropriate sentence for a second degree murder conviction where the court considered the gravity of the offense, finding that the circumstances of the crime were sufficiently egregious to justify a severe measure of retribution and deterrence. *State v. Whiteley*, 132 Idaho 678, 978 P.2d 238 (Ct. App. 1999).

Instructions to Jury.

Court may instruct jury concerning punishment for first degree murder, but not for second degree murder or manslaughter. *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922).

Parole Eligibility.

Where defendant sentenced for 60 years for second degree murder would be eligible for parole after serving one-third of his sentence, while those sentenced for life become eligible after 10 years, any sentence of 30 years or more for purposes of parole eligibility must be treated as effective life sentence. *King v. State*, 93 Idaho 87, 456 P.2d 254 (1969).

Right to Jury.

Neither the United States Constitution nor Idaho Const., Art. I, § 7 requires the participation of a jury in the sentencing process in a capital case. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

Sentence.

If a sentence of imprisonment is imposed for murder in the first degree, it must be for life, although it may be either an indeterminate life sentence or a fixed life sentence. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

—Analysis of Co-Defendant's Sentences.

A proportionality analysis comparing co-defendants' sentences is applicable only in cases involving the death penalty or allegations of cruel and unusual punishment. *State v. Book*, 127 Idaho 352, 900 P.2d 1363 (1995).

—Excessive.

Where a sentence is within statutory limits it will not be disturbed unless clear abuse of discretion is shown; such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. A sentence is reasonable to the extent it appears necessary, at the time of the sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

In deference to the discretionary authority vested in the trial courts, an appellate court will not substitute its view for that of the sentencing judge where reasonable minds might differ. The appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the criteria of protection of society, retribution, deterrence and rehabilitation. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Defendant was sentenced to a unified term of thirty-five years with seven years fixed for second degree murder, and although reasonable minds differed as to what punishment defendant should have received, where reasonable minds could differ whether a sentence is excessive, the decision of the sentencing court will not be disturbed. *State v. Varie*, 135 Idaho 848, 26 P.3d 31 (2001).

—Factors Considered.

A sentence need not serve all the sentencing goals; in appropriate cases, one may be sufficient. *State v. Waddell*, 119 Idaho 238, 804 P.2d 1369 (Ct. App. 1991).

The district court's reliance upon retribution and deterrence in imposing a sentence for defendant convicted of murder was sufficient to justify the sentence, and because rehabilitation was properly considered, there was no abuse of discretion in the sentencing. *State v. Waddell*, 119 Idaho 238, 804 P.2d 1369 (Ct. App. 1991).

Despite the fact that (1) a forensic psychiatrist testified that defendant, convicted of first degree murder, suffered to a moderate degree from an anti-social personality disorder that would diminish with age causing a precipitous drop in criminality after age 40, that (2) the psychiatrist further testified that defendant's severe alcoholism problem stemmed from genetic overloading over which he had no control and for which there was no treatment, that (3) based upon his observations the psychiatrist then opined that defendant's history suggested that he was unlikely to be involved in violent crimes in the future, and that (4) a supervisor for the Department of Probation and Parole testified that based upon his experience he thought defendant could be considered for parole sometime in the future, it was clear that the trial court considered these factors, especially whether defendant posed a continuing threat to society, although the court imposed a fixed life sentence with no possibility of parole, there was no abuse in the trial court's decision. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

Upon conviction of defendant for first degree murder, court did not abuse its discretion in sentencing defendant to a fixed life sentence instead of death where judge balanced mitigating factors that defendant did not have a history of violence, that he possessed

job skills as a truck driver, and had been a productive member of society, that drug and alcohol dependency adversely affected his thought process and some conduct on his part was inconsistent with a desire to commit murder and that defendant had exhibited extreme remorse for the crime, with the aggravating factors that the crime was atrocious and cruel, manifesting exceptional depravity and that the person murdered was a person who was a potential witness for the state in a criminal proceeding and who was murdered to prevent her from testifying. *State v. Wages*, 119 Idaho 738, 810 P.2d 272 (Ct. App. 1991).

A life sentence with a minimum period of confinement of 12 years for second degree murder was not unreasonable, in spite of fact that defendant had been subject to physical violence and sexual abuse as a child, where the exhibits and descriptions of the crime revealed tremendous pain and suffering experienced by the victim. *State v. Brady*, 122 Idaho 225, 832 P.2d 1160 (Ct. App. 1992).

Where codefendant recanted his testimony about defendant's role in a first-degree murder, defendant's sentence was vacated in the interest of justice and a new sentencing proceeding was directed. *Bean v. State*, 124 Idaho 187, 858 P.2d 327 (Ct. App. 1993).

After considering defendant's age and the nature and circumstance of his crime, 25-year term of confinement was not grossly disproportionate where he killed another human being by shooting the victim four times at point-blank range without any provocation, as the utter disregard for human life demonstrated in the commission of crime, coupled with the fact that it was committed against a law enforcement officer, might well have led to imposition of the death penalty or a fixed life sentence if the perpetrator had been an adult, and under circumstances, even in view of defendant's youth, court could not say that the sentence was out of all proportion to the gravity of the offense or such as to shock the conscience of reasonable people. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

When imposing sentence in a criminal proceeding, the trial court applies the following four criteria: (1) the protection of society; (2) deterrence to the defendant and others; (3) the possibility of rehabilitation; (4) punishment or retribution; the general objectives in the Supreme Court's review of a trial court's sentencing are: (1) the correction of a sentence which is excessive; (2) facilitation of rehabilitation of offender; (3) promotion of respect for law by correcting abuses; and (4) promotion of criteria for sentencing that are rational and just. *State v. Book*, 127 Idaho 352, 900 P.2d 1363 (1995).

In sentencing defendant for second degree murder, the trial court did not err by failing to

consider defendant's young age because the age of a defendant is not controlling in sentencing. *State v. Contreras*, 133 Idaho 862, 993 P.2d 625 (Ct. App. 2000).

District court did not abuse its discretion in sentencing defendant to life with a 20 year fixed term for the murder of a bail bondsman, because the district court based its decision on the goals of punishment and deterrence, and the nature of the offense was egregious, as defendant used lethal force to evade arrest by a person authorized by law to arrest him. *State v. Sheahan*, — Idaho —, 77 P.3d 956 (2003).

—Fixed Term.

Where intentional, senseless killing justified long-term confinement in retribution for the irretrievable loss that defendant had caused and defendant's history of behavioral and drug-related problems showed that rehabilitation would be a problematic task, sentence of fixed term of 25 years, imposed in second-degree murder case, was not excessive. *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct. App. 1983).

The defendant failed to show that the district court abused its discretion in sentencing him to a determinate life sentence for second degree murder where the court's conclusions that the circumstances surrounding the murder were egregious and that his lack of amenability to rehabilitation were supported by substantial and competent evidence. *State v. Burdett*, 134 Idaho 271, 1 P.3d 299 (Ct. App. 2000).

—Illegal Lesser Sentence.

This section requires, upon conviction for first-degree murder, punishment of either death or a life sentence. The trial judge may not impose a lesser, fixed term sentence; thus, the 25 year fixed sentence the defendant received was illegal, and was therefore vacated and remanded to the district court to impose a legal sentence. *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985), rev'd on other grounds, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

—Life Term.

As punishment for first degree murder, the accused may be sentenced to death or to a life term in the custody of the Board of Correction. Where capital punishment was not pursued by the state, the decision by the sentencing court as to whether the life sentence could be indeterminate with the possibility of parole after ten years, I.C. § 20-233, or would be served entirely in confinement as a fixed or determinate sentence without the possibility of parole, was a matter within the court's discretion. *State v. Tribe*, 126 Idaho 610, 888 P.2d 389 (Ct. App. 1994).

—Life Without Parole.

Where defendant repeatedly raped and battered a drunken woman and then beat her to death with a fire extinguisher, his fixed life sentence without possibility of parole under this section and § 19-2513 for the vicious and unprovoked attack, to which he pled guilty to first degree murder, was not an extreme sentence grossly disproportionate to the crime he committed, and as such, did not constitute the cruel and unusual punishment prohibited by Const., Art. I, § 6. *State v. Schneider*, 126 Idaho 624, 888 P.2d 798 (Ct. App. 1995).

—Minimum.

At a minimum, a district court must impose at least an indeterminate term of ten years for a conviction on second degree murder. *State v. Whiteley*, 132 Idaho 678, 978 P.2d 238 (Ct. App. 1999).

—Not Excessive.

A 20-year indeterminate sentence imposed for second-degree murder was not excessive where the judge found that the killing was not provoked or justified and the judge was clearly concerned with retribution and deterrence. *State v. Yon*, 115 Idaho 907, 771 P.2d 925 (Ct. App. 1989).

Sentence for second-degree murder of life imprisonment, with a ten-year minimum period of confinement, is not too harsh. *State v. Brazzell*, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990).

A fixed life sentence for defendant convicted of first degree murder was not excessive based on the gruesome facts of the murder and on the fact that the defendant had a prior conviction for second degree murder. *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), *aff'd*, 119 Idaho 1047, 812 P.2d 1208 (1991).

A life sentence with a 35 year minimum period of confinement for murder was reasonable where defendant had stabbed victim 11 times in order to take his money, credit cards and vehicle after the victim had offered defendant and companion food and shelter, defendant had a troubled background, and defendant showed no remorse for taking victim's life. *State v. Brewer*, 122 Idaho 213, 832 P.2d 1148 (Ct. App. 1992).

A sentence of life in the custody of the Board of Correction with a minimum period of confinement of 25 years for murder in the first degree was reasonable where victim offered food and a place to stay to defendants, yet defendant later stabbed victim to death with a butcher knife and absconded with victim's car and other valuables. *State v. Weinmann*, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992).

Where the gravity of the offense, infanticide through battery by striking of a six-week-old child in a moment of rage, was sufficiently egregious to justify an exceptionally severe

measure of retribution and deterrence, a sentence of life with the entire sentence to be served as a minimum term of confinement was reasonable. *State v. Pederson*, 124 Idaho 179, 857 P.2d 658 (1993).

The trial court properly denied defendant's motion to correct an illegal sentence where: the trial court found that for the crime of attempted first-degree murder, the maximum penalty defendant faced was one-half of a life sentence; the trial court fixed a base maximum of forty-five years based upon defendant's age and life expectancy; the trial court advised defendant that the maximum penalty he faced for attempted first-degree murder was twenty-two years and six months, one half of the base maximum; and the trial court then offered defendant the opportunity to withdraw his plea which he declined. *State v. Wood*, 125 Idaho 911, 876 P.2d 1352 (1994).

Where defendant bought a gun the day before the shooting, he violated a restraining order and went to his wife's home, he shot all six bullets from it at his wife, two to four of which hit her, and it was "purely miraculous" that she was not killed, given the sentencing goals of protecting society along with deterrence, rehabilitation and retribution, a seven-year fixed sentence is not longer than necessary to achieve these goals and was not unreasonable at the time imposed, even though defendant had no previous criminal involvement, and may not have posed a threat to the general public. *State v. Gomez*, 126 Idaho 83, 878 P.2d 782 (1994), *cert. denied*, 513 U.S. 1005, 115 S. Ct. 522, 130 L. Ed. 2d 427 (1994).

A unified sentence under § 19-2513 of 27 years, with a 12-year minimum period of confinement, for second degree murder, and a consecutive indeterminate term of five years for the use of a firearm in the commission of the crime, was within statutory limits for second degree murder under this section. *State v. Sengthavisouk*, 126 Idaho 881, 893 P.2d 828 (Ct. App. 1995).

The seriousness of a homicide offense mandates a punishment in the form of a substantial prison sentence; thus, the district court did not abuse its sentencing discretion by imposing an indeterminate life sentence, with a minimum period of confinement of 18 years for first degree murder by torture. *State v. Aeschliman*, 128 Idaho 60, 910 P.2d 174 (Ct. App. 1995).

A disparity in sentences between co-defendants does not constitute excessiveness of sentence as to any particular defendant. *State v. Book*, 127 Idaho 352, 900 P.2d 1363 (1995).

Where the trial court considered the sentence it imposed in light of the objectives of sentencing, and focused mainly on retribution, it did not abuse its discretion in imposing a term of life imprisonment with a mini-

imum term of confinement of twenty-one years for a conviction of second degree murder, since that is one of the most serious offenses that a person can commit. *State v. Kuzmichev*, 132 Idaho 536, 976 P.2d 462 (1999).

Where the district court concluded that, because of the depravity of the crime, the defendant's lack of remorse, and his prior acts of violence, he required correctional treatment to protect society and to effect retribution and deterrence, it was not abuse of discretion to impose a life sentence with a specified minimum period of 25 years, plus a consecutive fixed term of eight years for the use of a firearm. *State v. Trevino*, 132 Idaho 888, 980 P.2d 552 (1999).

Even in view of defendant's relatively limited level of participation in the planning of the crimes, the unified life sentence, with fifteen years fixed, for second degree murder, and the concurrent unified life sentence, with ten years fixed, for robbery were not out of proportion to the gravity of the offenses, and the district court carefully considered all the appropriate sentencing factors and weighed the evidence before it imposed the sentences. *State v. Jenkins*, 133 Idaho 747, 992 P.2d 196 (Ct. App. 1999).

Life sentence with a minimum period of confinement of thirty years was appropriate for second degree murder, regardless of the age of the defendant, where the gravity of the offense was sufficiently egregious to justify a severe measure of retribution and deterrence. *State v. Contreras*, 133 Idaho 862, 993 P.2d 625 (Ct. App. 2000).

The fact that defendant victimized a good samaritan who had stopped to offer his help, with the result that the victim lost his life. The callousness of this behavior, its consequences for the victim and his family, and defendant's history of criminality before this offense took place could not be overlooked in evaluating the sentence imposed; therefore, a unified life sentence with a twenty-year minimum term of imprisonment was not excessive for the felony murder. *State v. Shepherd*, 135 Idaho 48, 13 P.3d 1261 (Ct. App. 2000).

—Prosecutor's Recommendations.

A prosecuting attorney's sentencing recommendations are just that, mere recommendations; a judge is free to exercise his own judgment in carrying out his sentence responsibilities. *State v. Waddell*, 119 Idaho 238, 804 P.2d 1369 (Ct. App. 1991).

—Statement of Reasons.

While the setting forth of reasons for the imposition of a particular sentence would be helpful, and is encouraged, it is not mandatory. *State v. Osborn*, 104 Idaho 809, 663 P.2d 1111 (1983).

A sentencing judge is not required to check off or recite the sentencing guidelines during

sentencing, nor is a judge required to give his reasons for imposing a sentence. *State v. Waddell*, 119 Idaho 238, 804 P.2d 1369 (Ct. App. 1991).

—Unified Sentencing Act.

Provisions of this section relative to second degree murder are not "specific" provisions which conflict with the Unified Sentencing Act. *State v. Paul*, 118 Idaho 717, 800 P.2d 113 (Ct. App. 1990). ~

—Unified Term.

Based upon a review of the complete record, the district court did not abuse its discretion in sentencing defendant to a unified term of life imprisonment, with twenty-five years fixed, for his conviction of first degree murder and use of a deadly weapon. *State v. Santana*, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000).

—Validity.

Where the punishment for second-degree murder was in effect at the time of the victim's death as well as at the time of defendant's trial and sentencing, the trial judge was correct in sentencing her to life imprisonment under the lesser included offense of second-degree murder. *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979).

Where the defendant had no prior felony convictions, had turned herself in to the sheriff immediately after shooting her husband, showed remorse, had been drinking at the time of the shooting, and had reason to fear brutality from her husband, but had an unstable lifestyle and personality, could not control her jealousy to the point of murder, and could be regarded as dangerous, a sentence of 18 years was not an abuse of discretion. *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979).

Where record of the sentencing hearing indicated a lifetime pattern of violent physical behavior by defendant, and psychiatric reports showed his lack of remorse about his crime of murder and kidnapping and diagnosed him as having chronic, severe, explosive personality with strong sociopathic characteristics, as well as suffering from habitual, chronic and severe alcoholism, sentence of indeterminate period not to exceed 25 years, which was within statutory limits of this section, was not cruel and unusual punishment. *Watkins v. State*, 101 Idaho 758, 620 P.2d 792 (1980), overruled on other grounds, *State v. Broadhead*, 120 Idaho 141, 814 P.2d 401 (1991), overruled to the extent of conflict, *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

Where the defendant, in a state of extreme frustration, jealousy, and inebriation, entered a saloon and shot his wife three times thereby killing her, a sentence of an indeterminate prison term of not to exceed life imprisonment was not excessive, despite the defendant's

exemplary military service record and evidence showing him to be a good husband and father, considering the particularly heinous nature of the murder and the public interest in retribution. *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982).

An indeterminate sentence of 20 years was within the limit prescribed by this section and was not excessive even though the defendant was only 17 years old at the time he participated in the murder. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

Indeterminate life sentence imposed on defendant was within the maximum penalty authorized by statute for second-degree murder and was not excessive where defendant would be eligible for parole after ten years and a term of ten years' confinement would not exceed the minimum period necessary to protect society from defendant's conduct, or to serve society's interests in deterrence and retribution. *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct. App. 1983).

Indeterminate sentence of 20 years, upon conviction of second-degree murder based on defendant's shooting of wife, was within statutory maximum and was not excessive where defendant would be eligible for parole within five years, where sentence indicated that trial judge took account of mitigating factors, where society had an interest in retribution for and deterrence of similar crimes, and where rehabilitative programs would be available to aid defendant with regard to alcohol abuse and alleged post-traumatic stress disorder. *State v. Pettit*, 104 Idaho 601, 661 P.2d 767 (Ct. App. 1983).

Trial court did not abuse its discretion in imposing a fixed life term for conviction of murder, where murder was especially heinous, atrocious and cruel, manifesting exceptional depravity and where, by the murder and the circumstances surrounding its commission, the defendant exhibited utter disregard for human life. *State v. Osborn*, 104 Idaho 809, 663 P.2d 1111 (1983).

Sentence of indeterminate period not exceeding 25 years, imposed after conviction of second-degree murder, was not excessive where the record disclosed a senseless killing by a defendant with a long history of alcohol and firearm-related offenses; defendant would face confinement for a period of at least eight years and four months, under § 20-223, which was warranted in order to protect society from defendant and as retribution for the senseless taking of human life. *State v. Jenkins*, 105 Idaho 166, 667 P.2d 269 (Ct. App. 1983).

Sentence of a fixed life term for the crime of first-degree murder was well within the limits defined by statute where the record disclosed a heinous murder involving a brutal stabbing.

State v. Major, 105 Idaho 4, 665 P.2d 703 (1983).

Sentences imposed on defendant convicted of first-degree murder and use of firearm in murder, totaling 30 years, were within the statutory maximum that could have been imposed and were not an abuse of discretion. *State v. Camarillo*, 106 Idaho 310, 678 P.2d 102 (Ct. App. 1984).

A fixed term sentence of ten years or more but less than life is not a sentencing alternative for the crime of first degree murder. *State v. Wilson*, 107 Idaho 506, 690 P.2d 1338 (1984).

This section is not modified by § 19-2513A (repealed) so as to permit a sentence for first degree murder for a determinate or fixed period of years less than life. *State v. Wilson*, 107 Idaho 506, 690 P.2d 1338 (1984).

The 15-year indeterminate sentence for attempted second degree murder was not excessive, where the defendant wounded the night watchman four times with a .22 caliber pistol while burglarizing a convenience store, there was evidence that the victim's final wound was inflicted from close range while he was disabled and lying on his stomach, and the presentence investigation revealed several nonviolent prior offenses, including a third-degree theft conviction. *State v. Bourgeois*, 111 Idaho 479, 725 P.2d 184 (Ct. App. 1986) (decision prior to 1986 amendment).

Where the defendant went to the victim intending at least to rob him and ended up shooting him twice, first at close range in the head and second through a door and into the victim's heart, and the defendant had three adult felony convictions and numerous juvenile offenses beginning when he was 11 years old, the court did not abuse its discretion in sentencing the defendant to a fixed life sentence after he pled guilty to first-degree murder. *State v. Hoffman*, 111 Idaho 966, 729 P.2d 441 (Ct. App. 1986).

—Victim Impact.

It was not improper for the district judge to consider letters from the victim's family and testimony from the victim's mother prior to sentencing defendant upon his convictions for murder in the second degree, even though he was originally charged with a capital offense. *State v. Waddell*, 119 Idaho 238, 804 P.2d 1369 (Ct. App. 1991).

—Who May Fix.

Appellate court may modify judgment where jury has found defendant guilty of murder in first degree and affixed death penalty, when furtherance of justice requires such modification. *State v. Ramirez*, 34 Idaho 623, 203 P. 279, 29 A.L.R. 297 (1921).

Where jury fails to fix punishment, under this section, judge may do so, and if on appeal, appellate court should become satisfied that

trial judge abused his discretion in fixing death penalty it could modify punishment to life imprisonment. *State v. Ramirez*, 34 Idaho 623, 203 P. 279, 29 A.L.R. 297 (1921).

Only effect of this section is that where there is jury trial, on plea of not guilty, jury may decide which punishment shall be inflicted. Even in such case, if jury does not decide penalty, court must do so. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Statute makes no distinction in respect to punishment for first degree murder between different acts which constitute that crime. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

The responsibility for fixing the penalty for homicide, within the terms of the statute, is that of the presiding judge, not of the jury or the supreme court. By Morgan, J., dissenting from decision reducing minimum sentence from 20 to 10 years. *State v. Boyatt*, 59 Idaho 771, 87 P.2d 992 (1939).

That part of an instruction which informed the jury that in the event they should find the defendant guilty of murder in the first degree, they may then determine whether the penalty to be imposed shall be death or life, was in conformity with the former section. *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961).

Validity of Sentence.

It cannot be said as a matter of law that a sentence for not to exceed sixty years for second-degree murder is a sentence or imposes a penalty greater than does a sentence

for life, and hence the imposition of such a sentence is within the statutory limitations. *King v. State*, 91 Idaho 97, 416 P.2d 44 (1966).

The sentence of "not more than 21 years" being clearly within the statutory limits for the conviction of second-degree murder, is not normally an abuse of discretion. *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973).

Sentence of 30 years for second degree murder was not cruel and unusual punishment nor an abuse of discretion by the trial court where defendant had been previously convicted of three felonies. *State v. McClellan*, 96 Idaho 569, 532 P.2d 574, overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

Where there was no evidence of provocation, the trial court did not abuse its discretion in sentencing a defendant convicted of second-degree murder to life imprisonment, and such sentence was within the statutory limits. *State v. Ward*, 98 Idaho 571, 569 P.2d 916 (1977).

Collateral References. Recital of, or reference to, the offense in pronouncing sentence or judgement. 14 A.L.R. 1000.

Reduction of punishment imposed by trial court by appellate court. 89 A.L.R. 312.

Victim impact evidence in capital sentencing hearings — post-*Payne v. Tennessee*. 79 A.L.R.5th 33.

The 2003 amendment by Ch. 136, § 1, inserted "and 19-2515A" near the beginning of the section, and made a stylistic change.

18-4004A. Notice of intent to seek death penalty. — (1) A sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty with the court and served the notice upon the defendant or his attorney of record no later than thirty (30) days after entry of a plea. Any notice of intent to seek the death penalty shall include a listing of the statutory aggravating circumstances that the state will rely on in seeking the death penalty. The state may amend its notice upon a showing of good cause at any time prior to trial. A notice of intent to seek the death penalty may be withdrawn at any time prior to the imposition of sentence.

(2) In the event that the prosecuting attorney does not file a notice of intent to seek the death penalty or otherwise puts the court on notice that the state does not intend to seek the death penalty, the court shall inform potential jurors at the outset of jury selection that the death penalty is not a sentencing option for the court or the jury. [I.C., § 18-4004A, as added by 1998, ch. 96, § 2, p. 343; am. 2003, ch. 19, § 2, p. 71.]

Compiler's notes. Section 3 of S.L. 1998, ch. 96 is compiled as § 19-2515.

Section 3 of S.L. 2003, ch. 19 is compiled as § 19-2126.

Section 7 of S.L. 2003, ch. 19 declared an emergency. Approved February 13, 2003.

Sec. to sec. ref. This section is referred to in §§ 18-4004, 19-2515 and 19-2515A.

18-4005. Petit treason abolished. — The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this chapter. [I.C., § 18-4005, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6564; C.S., § 8213; I.C.A., § 17-1105, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4006. Manslaughter defined. — Manslaughter is the unlawful killing of a human being including, but not limited to, a human embryo or fetus, without malice. It is of three (3) kinds:

1. Voluntary — upon a sudden quarrel or heat of passion.
2. Involuntary — in the perpetration of or attempt to perpetrate any unlawful act, other than arson, rape, robbery, kidnapping, burglary, or mayhem; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; or in the operation of any firearm or deadly weapon in a reckless, careless or negligent manner which produces death.
3. Vehicular — in which the operation of a motor vehicle is a significant cause contributing to the death because of:
 - (a) the commission of an unlawful act, not amounting to a felony, with gross negligence; or
 - (b) the commission of a violation of section 18-8004 or 18-8006, Idaho Code; or
 - (c) the commission of an unlawful act, not amounting to a felony, without gross negligence.

Notwithstanding any other provision of law, any evidence of conviction under subsection 3.(b) shall be admissible in any civil action for damages resulting from the occurrence. A conviction for the purposes of subsection 3.(b) means that the person has pled guilty or has been found guilty, notwithstanding the form of the judgment(s) or withheld judgment(s). [I.C., § 18-4006, as added by 1972, ch. 336, § 1, p. 844; am. 1983 (Ex. Sess.), ch. 3, § 17, p. 8; am. 1984, ch. 22, § 5, p. 25; am. 1997, ch. 103, § 1, p. 244; am. 2002, ch. 330, § 2, p. 935.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 18; R.S., R.C., & C.L., § 6565; C.S., § 8214; am. S.L. 1921, ch. 155, § 1, p. 347; I.C.A., § 17-1106; am. S.L. 1949, ch. 126, § 1, p. 221; am. S.L. 1965, ch. 136, § 2, p. 268, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

This section was also amended by S.L. 1983, ch. 145, § 17, effective July 1, 1983.

However, ch. 145 was repealed by § 21 of S.L. 1983 (Ex. Sess.), ch. 3, effective May 19, 1983.

The "s" in parentheses so appeared in the law as enacted.

Present version of section 16 of S.L. 1983 (Ex. Sess.), ch. 3 is compiled as § 49-240.

Sections 4 and 6 of S.L. 1984, ch. 22 are compiled as §§ former 49-326 and 1-2222, respectively.

Sections 1 and 3 of S.L. 2002, ch. 330 are compiled as §§ 18-4001 and 18-4016, respectively.

Section 8 of S.L. 1984, ch. 22 declared an emergency and provided that the act should take effect on March 1, 1984. Approved February 29, 1984.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-4007, 18-8001, 18-8002, 18-8005, 19-2520, 19-5307, 19-5506, 20-525A, 33-1208, 39-1113 and 72-1003.

Cited in: *State v. Phinney*, 13 Idaho 307, 89 P. 634, 12 L.R.A. (n.s.) 935, 12 Ann. Cas. 1079 (1907); *In re McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913); *Maxfield v. Thomas*, 557 F. Supp. 1123 (D. Idaho 1983); *State v. Howerton*, 105 Idaho 1, 665 P.2d 700 (1983); *State v. Vasquez*, 107 Idaho 1052, 695 P.2d 437 (Ct. App. 1985); *State v. Valdez-Abrejo*, 108 Idaho 79, 696 P.2d 930 (Ct. App. 1985); *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *State v. Puga*, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986); *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987); *State v. Gunderson*, 120 Idaho 97, 813 P.2d 908 (Ct. App. 1991); *Idaho v. Horiuchi*, 215 F.3d 986 (9th Cir. 2000); *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000); *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001); *State v. Ransom*, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002).

ANALYSIS

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Although hypnotically refreshed testimony may be admitted in some circumstances, the district judge did not err in refusing to admit testimony about the sodium amytal interview where the court was not furnished any scientific basis to conclude that hypnosis and the use of sodium amytal produce comparable results. *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

—Blood Tests.

Evidence in involuntary manslaughter prosecution of appellant's refusal to submit to

a blood test was competent and admissible for, like any other act or statement voluntarily made by him, it was competent for a jury to consider and weigh, with the other evidence, and to draw from it whether the inference as to guilt or innocence may be justified thereby. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

Constitutionality.

The former provision relating to involuntary manslaughter in the use of firearms was not unconstitutionally vague, but was sufficient to apprise the users of firearms of the conduct prohibited and so complied with all the requirements guaranteed by the state and U.S. constitutions. *State v. Brinton*, 91 Idaho 856, 433 P.2d 126 (1967).

The fact that subsection 3.(c) of this section criminalizes an act of ordinary negligence, as opposed to criminal negligence does not violate the due process clause of the United States Constitution. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

Construction.

The conflict between the involuntary manslaughter statute imposing a sentence of imprisonment not exceeding ten years in the state prison and the negligent homicide statute imposing a sentence of imprisonment not exceeding one year without designating the state prison or the county jail cannot be reconciled, and that being so, the negligent homicide statute must govern since it is the later enactment. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Where the judgment of conviction of the felony of involuntary manslaughter had been given under a statute which was subsequently repealed by former § 49-1101, a part of S.L. 1953, ch. 273 repealing all inconsistent laws, the cause would be remanded with instructions to the trial court to enter judgment of conviction for the misdemeanor of negligent homicide under former § 49-1101. *State v. Gummerson*, 79 Idaho 30, 310 P.2d 362 (1957).

Section 18-114 prescribes a general requirement for the mental element of a crime; but the legislature may vary this requirement in defining a particular offense, subject to constitutional limits. The legislature has varied the requirement in subsection 3.(c) of this section, and the two sections do not conflict. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

Cross-examination by Trial Judge.

Cross-examination of appellant by judge tending to infer guilt of involuntary manslaughter from which jury probably inferred he was trying to bring about his conviction was ground for reversal. *State v. Freitag*, 53 Idaho 726, 27 P.2d 68 (1933).

Due Caution.

Fact that defendant was angry, excited, or frightened does not necessarily raise presumption that he failed to use due caution and circumspection when firing fatal shot. *State v. Voss*, 34 Idaho 164, 199 P. 87 (1921).

While an instruction defining "without due caution or circumspection" would not have been improper, such terms are of common usage and generally understood so that an instruction defining them was unnecessary and there was no error in refusing such a requested instruction. *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968).

Firearm.

The consideration of defendant's use of a firearm both in arriving at the underlying manslaughter sentence and in adding to that sentence pursuant to § 19-2520 did not punish defendant twice for the same behavior; in effect, the legislature has elected to fix two different penalties for the crime of manslaughter — a lesser penalty where the crime was committed without the use of a deadly weapon, and a greater one where a deadly weapon was involved. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Indictment and Information.

Information held sufficient. *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915).

Information charging that defendant willfully, unlawfully, and feloniously killed deceased held sufficient to support conviction for involuntary manslaughter by running down a pedestrian, where evidence showed that at time of the accident defendant was intoxicated and was driving his car over wet pavements at an excessive speed. *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930).

Information for involuntary manslaughter by causing death with automobile need not set forth details of commission of offense. *State v. Brooks*, 49 Idaho 404, 288 P. 894 (1930).

Information held not duplicative as charging manslaughter and driving motor vehicle while intoxicated. *State v. Frank*, 51 Idaho 21, 1 P.2d 181 (1931).

Manslaughter is an offense included in the charge of murder. *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941).

The allegations contained in the information of the commission of unlawful acts in violation of certain statutory law and ordinances may be regarded as allegations of fact out of which the reckless disregard and the negligence interpreted as reckless disregard arises which is the basis of the charge and though they may be characteristic of the charge of manslaughter, they cannot have the effect of changing the charge from negligent homicide to manslaughter further because the proof thereof did not and could not in-

crease the penalty beyond that fixed by the negligent homicide statute. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Instructions to Jury.

It is error to instruct jury that one who kills another while resisting attempt to commit a serious injury on his person is guilty of manslaughter, such killing being justifiable under § 18-4009. *State v. Crea*, 10 Idaho 88, 76 P. 1013 (1904).

Instructions in prosecution for involuntary manslaughter by causing death with automobile. *State v. Brooks*, 49 Idaho 404, 288 P. 894 (1930).

Where court instructed jury that if they found defendant guilty of violating any one of statutory rules governing operation of automobiles on public highways, then defendant would be guilty of manslaughter, such instruction was prejudicial error since jury could have found defendant guilty of an offense not charged in the indictment. *State v. Taylor*, 67 Idaho 313, 177 P.2d 468 (1947).

Where a charge in prosecution for involuntary manslaughter was given as to manslaughter in the perpetration of an unlawful act, namely, the violation of four traffic statutes, reckless driving, driving while intoxicated, at an excessive speed, and on the wrong side of the road, the failure to charge on criminal negligence in manslaughter in the commission of a lawful act without due caution and circumspection was not prejudicial error. *State v. Salhus*, 68 Idaho 75, 189 P.2d 372 (1948).

Instruction on criminal negligence was not required in proceeding in which defendant was charged with offense of involuntary manslaughter, where acts committed by defendant were unlawful acts by virtue of former §§ 49-502, 49-503. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

An instruction on criminal intent was not necessary in proceeding where defendant was charged with offense of involuntary manslaughter. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Instruction defining involuntary manslaughter was not erroneous where instruction followed the exact wording of the statute. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

In involuntary manslaughter proceeding where jury at its own request was brought into presence of court and parties, and asked the court if it was required to recommend punishment of defendant, and court said no since that was the duty of the court, it was not error for court to fail to instruct jury on matter of included offenses. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

In a prosecution for second degree murder wherein the jury returned a verdict of guilty

of involuntary manslaughter, an instruction on circumstantial evidence which included the following statement "The accused's evasions, denials, contradictions and falsities may be considered as links in the chain of circumstantial evidence showing his guilt" was reversible error, since the statement singled out the accused, and instructed the jury that the accused factually committed evasions, denials, contradictions, and falsities, and that same could be considered by the jury as links in the chain of circumstantial evidence showing his guilt. *State v. Sundstrom*, 77 Idaho 72, 286 P.2d 640 (1955).

Jury instruction defining manslaughter which omitted the clause contained in 1949 amendment "or in the operation of any fire-arm or deadly weapon in a reckless, careless or negligent manner which produces death" was not a correct definition of manslaughter. *State v. Sundstrom*, 77 Idaho 72, 286 P.2d 640 (1955).

An instruction defining manslaughter in the language of the former statute except for the first sentence, reading, "Manslaughter is the unlawful killing of a human being, without deliberation, premeditation, or malice," was not erroneous or misleading where other instructions correctly defined "deliberation" and "premeditation." *State v. Koho*, 91 Idaho 450, 423 P.2d 1004 (1967).

In a murder prosecution the use of the word "malice" instead of "malice aforethought" in jury instructions was not error where word "malice" was used for the same purpose and in same manner in § 18-4002, which used word "malice" to refer to "malice aforethought" as that term was used in § 18-4001. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Failure of trial court to give instruction as to voluntary manslaughter was not error where no evidence was introduced which would indicate that the accused acted upon a "sudden quarrel or heat of passion." *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973).

A jury need not be instructed in the esoteric distinctions between general and specific intent, and where the instructions to the jury repeatedly emphasized that before defendant could be convicted he must have acted with the intent to kill victim, the jury instructions, when read and considered as a whole, adequately instructed the jury concerning the elements of murder in the first and second degree and manslaughter, and the distinctions between each including intent. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

District court did not abuse its discretion in deciding not to give a jury instruction on involuntary or voluntary manslaughter as lesser offenses of first-degree murder where evidence showed that a 12 gauge shotgun was

fired into an occupied room exhibiting a wanton disregard for human life which might lead a jury to infer "malice aforethought" which is an element of both first and second-degree murder but not to involuntary manslaughter; additionally there was no evidence to indicate the murder took place in the heat of passion. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), cert. denied, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Where defendant objected to language in jury instructions taken from this section, §§ 18-4001 and 18-4002 defining murder, malice and manslaughter, as incomprehensible and unnecessarily confusing, the Court of Appeals noted that until the legislature chose to amend the language of the statutes, the court was bound by the words that the legislature had chosen for the definition of various crimes. *State v. Carsner*, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995).

Intent.

The basic distinction between voluntary and involuntary manslaughter is that voluntary manslaughter requires an intent to kill whereas involuntary manslaughter does not. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

Judgment of acquittal was reversed where the jury could reasonably have concluded that defendant intended to promote or facilitate the commission of the offense by his co-defendant when defendant, failing to shoot the victim on his own and undergoing a beating at the victim's hands, asked for help from his co-defendant, whom he knew to be armed with a pistol. *State v. Gonzalez*, 134 Idaho 907, 12 P.3d 382 (Ct. App. 2000).

Involuntary.

Because all of the elements needed to sustain a conviction of the crime of involuntary manslaughter are included within the elements needed to sustain a conviction of second-degree murder, the trial court in a second-degree murder prosecution did not err when it instructed the jury on the lesser included offense of involuntary manslaughter, where there was evidence presented to support all of the essential elements of involuntary manslaughter. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

—Elements.

The elements of involuntary manslaughter are: (a) an unlawful killing, without malice and without an intent to kill. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

The elements of voluntary manslaughter are: (a) an unlawful killing, with (b) the intent to kill, but without malice. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

Legislative Intent.

Read as a whole, this section clearly and unambiguously indicates the legislature's in-

tent to protect individual victims and to criminalize the unlawful killing of a human being; it necessarily follows that multiple deaths resulting from a single act of driving can be charged as separate offenses under this section. *State v. Lee*, 116 Idaho 515, 777 P.2d 737 (Ct. App. 1989).

Means of Death.

Statute does not circumscribe the means or agency causing death. Prosecution for manslaughter may be had where death of human being has been caused or accomplished through fright, fear, terror, or nervous shock produced by accused while in the commission of an unlawful act, even though accused made no hostile demonstration and directed no overt act at person of deceased. In some instances force or violence may be applied to the mind or nervous system as effectually as to the body. In *re Heigho*, 18 Idaho 566, 110 P. 1029, 32 L.R.A. (n.s.) 877, Ann. Cas. 1912A, 138 (1910).

Where defendant pointed his gun at the victim with whom he had altercation and the gun discharged, causing death, the conviction of second-degree murder was proper and the circumstances of the shooting would not support a conviction of voluntary manslaughter. *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971).

Motor Vehicle Operation.

By the enactment of the negligent homicide statute as a part of the Uniform Act Regulating Traffic on Highways, it would appear the legislature intended to, and it did legislate anew in the field of homicide resulting from the improper operation of motor vehicles; that by such legislation the legislature intended to remove from the purview of the earlier involuntary statute, such classification of homicide, and to place it within the purview of the later negligent homicide statute. It appears that the legislature thereupon repealed the manslaughter statute insofar as it included within its purview homicide resulting from the improper operation of motor vehicles and immediately thereupon enacted the negligent homicide statute including thereunder the subject matter of homicide so resulting, with redefinition of penalty therefor. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

The information laid under the involuntary manslaughter statute which included in its charge the unlawful driving and operation of a motor vehicle in a reckless manner but without malice resulting in death, though differing in phraseology from the charge if laid under the negligent homicide statute sufficiently charged the commission by the appellant of the crime defined by former § 49-1101 and denominated as negligent homicide. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Vehicular involuntary manslaughter under this section is not subject to the restrictive interpretation of "criminal negligence" in § 18-114 under which it has been interpreted to mean gross negligence; the legislature was free to create a separate, lesser category of crime for vehicular homicides lacking gross negligence. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

A jury finding that the defendant, who was convicted of involuntary manslaughter in connection with an automobile accident, was guilty of gross negligence was adequately supported by testimony that the defendant had been drinking and by evidence from which it could be inferred that the defendant's vehicle had crossed the centerline of the highway. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

By creating the statutory section labeled "vehicular manslaughter," the legislature did not intend to downgrade the culpability or punishment of persons who intentionally use motor vehicles to commit aggravated batteries or other felonies ultimately resulting in death; it would be an absurd result if a driver who, although intoxicated, was capable of intentionally committing a felony that produced death—and did so—could be convicted only of vehicular manslaughter and sentenced to a seven-year term of imprisonment. *Simons v. State*, 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989).

Where defendant got into a car, locked the doors and began to drive away and victim's hand became caught in the passenger door between the window and frame, where defendant did not stop the car and release victim and dragged victim to his death, and where defendant had a blood alcohol level of .26% at the time of the incident, the crime committed in the case was not a vehicular manslaughter rather than an involuntary manslaughter; defendant mischaracterized the conduct as vehicular manslaughter since defendant was charged with causing an unintended death through an intentional act—i.e., aggravated battery, a felony, and this alleged conduct was much more serious than causing an unintended death through accidental conduct while driving under the influence of alcohol. *Simons v. State*, 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989).

The misdemeanor form of vehicular manslaughter has some relationship to the general felony of manslaughter at common law, nevertheless it resembles more closely a public welfare offense, and as such need not contain a criminal negligence requirement. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

Defendant was convicted of vehicular homicide and aggravated driving under the influence of alcohol because the death of the first

victim and the bodily injury inflicted upon the second victim resulted from his single act of driving under the influence. *State v. Lowe*, 120 Idaho 391, 816 P.2d 347 (Ct. App. 1990).

A reading of the sentencing provisions set forth in § 18-4007 makes it clear that a court-imposed license suspension for a violation of subdivision (3) of this section is unauthorized and hence "illegal." It should be noted, however, that under the provisions of I.C. § 49-325(1), the Idaho Transportation Department has the authority to revoke the driving privileges of an individual convicted of subdivision (3) of this section. *State v. Howard*, 122 Idaho 9, 830 P.2d 520 (1992).

Negligence.

This section must be read and construed with § 18-114 and the term criminal negligence as used in that section does not mean the failure to exercise ordinary care, it means gross negligence, such as amounts to reckless disregard of consequences and the rights of others. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

This section must be read in connection with § 18-114 which requires the joint union of act and intent or criminal negligence. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

Where truck driven by accused stopped on highway because of engine trouble and accused did everything in his power to remove the truck from the pavement but was unsuccessful, he was not guilty of involuntary manslaughter when an automobile crashed into the truck whereby one of the occupants of the automobile was killed. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

Conviction of involuntary manslaughter was authorized by evidence of the violation of four traffic statutes, namely, reckless driving, driving while intoxicated, at an excessive speed, and on the wrong side of the road. *State v. Salhus*, 68 Idaho 75, 189 P.2d 372 (1948).

Where a jury specifically found that the defendant was grossly negligent in causing the death of a person in an automobile accident and the jury convicted the defendant of involuntary manslaughter, the defendant failed to show how his right to due process was infringed by his claim that this section was void for vagueness insofar as it proscribed conduct without gross negligence, since the defendant was not charged with, nor was he convicted of, conduct lacking gross negligence. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

The reference to "culpable negligence" in § 18-201 is simply a reiteration of the excusable homicide standard under § 18-4012. It does not preclude imposition of criminal re-

sponsibility for negligence under this section. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

Partial Repeal of Section.

The Uniform Act Regulating Traffic on Highways is a comprehensive statute, legislatively intended to cover the whole field and subject matter of the operation of motor vehicles, including definitions of the several offenses growing out of the improper operation of such vehicles, prescribing penalties for those offenses, and repealing by implication all acts and parts of acts inconsistent therewith. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

In a prosecution for involuntary manslaughter, in view of the holding of this court in the case of *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957), former § 49-1101 relative to negligent homicide, being a part of chapter 273 of the 1953 Session Laws, was held to repeal that part of the involuntary manslaughter statute with reference to the killing of a human being by the reckless and negligent operation of an automobile. *State v. Gummerson*, 79 Idaho 30, 310 P.2d 362 (1957).

Proof of Elements.

In homicide and related cases, proof of each element of a crime beyond a reasonable doubt means proving: (1) a death, and (2) the defendant unlawfully caused that death. *State v. Maxfield*, 106 Idaho 206, 677 P.2d 519 (Ct. App. 1984).

Sentencing.

In sentencing defendant for involuntary manslaughter, the court was entitled to consider all relevant information regarding the crime, including a defendant's lack of remorse even though defendant had entered an Alford plea. *State v. Howry*, 127 Idaho 94, 896 P.2d 1002 (Ct. App. 1995).

Where "infliction of great bodily injury" was an essential element of involuntary manslaughter, it could not also be used for sentence enhancement, because the language found in § 19-2520B indicates that the legislature did not intend for the elements constituting a crime to be used a second time to impose a harsher sentence on a defendant. *State v. Elison*, 135 Idaho 546, 21 P.3d 483 (2001).

There was error in imposing sentence enhancements for use of a deadly weapon in defendant's convictions for involuntary manslaughter and aggravated battery because three of defendant's crimes arose out of the same indivisible course of conduct, and therefore, he was only subject to one enhanced penalty. *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001).

Sufficiency of Evidence.

Where defendant continued to shoot at victim, who had threatened defendant's family with a gun, even after victim had retreated, there was substantial and competent evidence to support jury's conclusion that defendant was guilty of voluntary manslaughter. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981).

Medical testimony that, to a reasonable medical certainty, the enema treatment administered by defendant in manslaughter prosecution worsened victim's heart failure which resulted in death was sufficient to support a permissible inference of causation by the jury; the mere fact that death may have resulted from the combined effects of the enema treatment and some other cause or preexisting condition would not relieve defendant of criminal responsibility. *State v. Maxfield*, 106 Idaho 206, 677 P.2d 519 (Ct. App. 1984).

Where the jury could have found that police officers were alive when the final shots that killed them were fired and there was nothing in the jury verdict to suggest that the jury found that defendant acted in self-defense at any stage of the shooting, there was sufficient evidence to support defendant's manslaughter convictions. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Where the defendant was driving in the wrong direction on the freeway, his car was stopped a few miles past, and a few minutes after the fatal rollover, several witnesses at the scene of the rollover gave descriptions generally matching his car, an intoximeter test revealed that his blood-alcohol content was between .18 percent and .20 percent, and the defendant himself admitted driving while intoxicated and on the wrong side of the freeway, there was abundant evidence linking him to the fatal accident; accordingly, the trial judge did not err in denying the motion for judgment of acquittal. *State v. Hinostroza*, 114 Idaho 621, 759 P.2d 912 (Ct. App. 1988).

There was sufficient evidence to support the verdict of voluntary manslaughter of two game wardens, despite defendant's argument that the jury found that he had acted in self-defense when he initially shot them and that there was insufficient evidence to support the voluntary manslaughter conviction because the state did not prove beyond a reasonable doubt that the victims were alive when he fired the second set of shots. *Dallas v. Arave*, 984 F.2d 292 (9th Cir. 1992).

Vehicular Manslaughter.

The district court properly exercised its discretion in denying vehicular manslaughter defendant's motion to strike from the presentence report the statements of the two girls who were injured in the auto accident and their parents, and the court gave appropriate weight to such statements at sentencing. *State v. Wersland*, 125 Idaho 499, 873 P.2d 144 (1994).

Trial court properly admitted statements defendant made to medical personnel and police officers after he was transferred to hospital for treatment of injuries suffered in alcohol-related accident, and trial court did not abuse its discretion by sentencing defendant to unified sentence of six years, with a minimum period of confinement of four years, for vehicular manslaughter. *State v. Langford*, 136 Idaho 334, 33 P.3d 567 (Ct. App. 2001).

Defendant's action in running a stop sign, resulting in a collision with another vehicle which caused the death of a child riding in the second vehicle, constituted gross negligence within the meaning of § 18-4006(3)(a) sufficient to support defendant's conviction of felony vehicular homicide; trial court's use of Idaho Crim. Jury Instruction 342 to define "gross negligence" rather than defendant's proposed instruction taken from a case involving the Idaho Guest Statute was proper. *State v. Sibley*, 138 Idaho 259, 61 P.3d 616 (Ct. App. 2002).

DECISIONS UNDER PRIOR LAW**ANALYSIS**

Abortion not manslaughter.

Constitutionality.

Construction.

Cross-examination by court.

Evidence.

Information.

Instructions.

Manslaughter.

Negligent homicide.

Proximate cause.

Question for jury.

Speed.

Abortion Not Manslaughter.

Criminal operation resulting in death, an abortion not being necessary to save the woman's life, is murder in the second degree. Instruction that such act is murder in the second degree or manslaughter is erroneous. *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901).

Constitutionality.

The former negligent homicide statute which definitely made it a crime for the operator of an automobile to injure and cause the death of another by driving an automobile in reckless disregard of the safety of others was

not unconstitutional on the ground of uncertainty. *State v. Aims*, 80 Idaho 146, 326 P.2d 998 (1958).

Construction.

The conflict between the involuntary manslaughter statute imposing a sentence of imprisonment not exceeding ten years in the state prison and the negligent homicide statute imposing a sentence of imprisonment not exceeding one year without designating the state prison or the county jail could not be reconciled, and that being so, the negligent homicide statute governed since it was the later enactment. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Cross-examination by Court.

In a manslaughter prosecution for death, caused while driving automobile, cross-examination by court of the accused leaving inference that the court believed the accused to be guilty was reversible error. *State v. Freitag*, 53 Idaho 726, 27 P.2d 68 (1933).

Evidence.

Conviction of involuntary manslaughter was authorized by evidence of the violation of four traffic statutes, namely, reckless driving, driving while intoxicated, at an excessive speed, and on the wrong side of the road. *State v. Salhus*, 68 Idaho 75, 189 P.2d 372 (1948).

Evidence given that appellant stated he had had a few drinks, that his companion was as drunk as he was and other testimony, was sufficient to sustain a finding by the jury that appellant was driving his automobile at the time of the accident while under the influence of intoxicating liquor. *State v. Aims*, 80 Idaho 146, 326 P.2d 998 (1958).

Evidence to the effect that defendant was intoxicated and driving on the wrong side of the road, and as a result collided with automobile in which the deceased was riding, thereby causing her to suffer injuries which were the proximate cause of her death was sufficient upon which to predicate a verdict of guilty of negligent homicide. *State v. Cox*, 82 Idaho 150, 351 P.2d 472 (1960).

Evidence as to excessive speed and intoxication, although conflicting, was sufficient to sustain conviction on charge of negligent homicide. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Information.

The information laid under the involuntary manslaughter statute which included in its charge the unlawful driving and operation of a motor vehicle in a reckless manner without malice resulting in death, though differing in phraseology from the charge if laid under the negligent homicide statute sufficiently charged the commission by the appellant of

the crime denominated as negligent homicide. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

The information charging that a defendant drove his automobile "negligently, carelessly, recklessly and heedlessly, in wanton and willful disregard of the rights and safety of others and without due caution and circumspection and at an excessive rate of speed under the circumstances and in a manner so as to endanger persons and property," was sufficient basis for conviction of the crime of negligent homicide. *State v. Gummerson*, 79 Idaho 30, 310 P.2d 362 (1957).

Information charging that defendant "willfully, unlawfully, negligently, recklessly and in a careless manner, and while under the influence of intoxicating liquor, and without caution and circumspection or regard for the safety of others, did drive his automobile across the center line of said highway and on the left side of the road and in front of" approaching automobile as a proximate result of which a passenger in such automobile received mortal wounds and died was sufficient. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960).

Instructions.

In a prosecution of motorist for manslaughter, instruction that if defendant was not guilty of manslaughter, jury might find him guilty of reckless driving was properly refused. *State v. Monteith*, 53 Idaho 30, 20 P.2d 1023 (1933).

In a manslaughter prosecution, instruction on necessity of jury finding that negligence or some other unlawful act of motorist was the proximate cause of death was not erroneous so far as affecting question on instruction on a lesser offense was concerned. *State v. Monteith*, 53 Idaho 30, 20 P.2d 1023 (1933).

Where court instructed jury that if they found defendant guilty of violating any one of statutory rules governing operation of automobiles on public highways, then defendant would be guilty of manslaughter, such instruction was prejudicial error since jury could have found defendant guilty of an offense not charged in the indictment. *State v. Taylor*, 67 Idaho 313, 177 P.2d 468 (1947).

There was no error in giving instruction reiterating allegations of information since information charged but one offense, that of negligent homicide, although the allegation charged such offense committed by the use of different means all in one count. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960).

While instruction that jury could find defendant guilty if "you find that he did them in a negligent, heedless, reckless and careless manner and without due caution and circumspection" was erroneous it was not reversible error where other instructions properly re-

quired the jury to find the defendant guilty of criminal negligence. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

An instruction omitting the statutory requirement that the homicide must be the result of reckless disregard on the part of the accused was objectionable since the death must be the "proximate result" of the injury received by the driving and not merely "involved" in the driving. *State v. McGlochlin*, 85 Idaho 459, 381 P.2d 435 (1963).

Manslaughter.

In a manslaughter prosecution, instruction on necessity of jury finding that negligence or some other unlawful act of motorist was the proximate cause of death was not erroneous so far as affecting question on instruction on a lesser offense was concerned. *State v. Monteith*, 53 Idaho 30, 20 P.2d 1023 (1933).

Where a charge in prosecution for involuntary manslaughter was given as to manslaughter in the perpetration of an unlawful act, namely, the violation of four traffic statutes, reckless driving, driving while intoxicated, at an excessive speed, and on the wrong side of road, the failure to charge on criminal negligence in manslaughter in the commission of a lawful act without due caution and circumspection was not prejudicial error. *State v. Salhus*, 68 Idaho 75, 189 P.2d 372 (1948).

Negligent Homicide.

By the enactment of the negligent homicide statute as a part of the Uniform Act Regulating Traffic on Highways, it would appear the legislature intended to, and it did legislate anew in the field of homicide resulting from the improper operation of motor vehicles; that by such legislation the legislature intended to remove from the purview of the earlier involuntary statute, such classification of homicide, and to place it within the purview of the later negligent homicide statute. It appears that the legislature thereupon repealed the manslaughter statute insofar as it included within its purview homicide resulting from the improper operation of motor vehicles and immediately thereupon enacted the negligent homicide statute including thereunder the subject matter of homicide so resulting, with redefinition of penalty therefor. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

The legislature not having provided that the more severe sentence be exacted as punishment for negligent homicide, i.e., imprisonment in the state prison, it thereby intended the lesser penalty therefor, i.e., imprisonment in the county jail. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

It is clear that the legislature, by not classifying negligent homicide either as a felony or as a misdemeanor, thereby intended to classify such offense as a misdemeanor. *State*

v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

Negligent homicide was a misdemeanor, therefore a conviction thereunder does not require proof of felonious conduct. *State v. Pappe*, 83 Idaho 358, 362 P.2d 1083 (1961).

The phrase "in reckless disregard of the safety of others" imported the requirement that criminal negligence and reckless disregard of consequences and of the rights of others were necessary ingredients in the crime of negligent homicide. *State v. Pappe*, 83 Idaho 358, 362 P.2d 1083 (1961).

Proximate Cause.

In a manslaughter prosecution for death, caused while driving automobile, cross-examination by court of the accused leaving inference that the court believed the accused to be guilty was reversible error. *State v. Freitag*, 53 Idaho 726, 27 P.2d 68 (1933).

The facts and circumstances shown by the evidence failed to reveal any conduct on the part of deceased constituting an intervening proximate cause of the accident which resulted in her death where she was crossing an intersection at which there was no control signal and defendant motorist was shown to be driving his car in a reckless manner in disregard of the life of decedent, it further being his duty to yield right of way to her and to keep a lookout in the exercise of due care for deceased's safety. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Question for Jury.

The evidence that defendant's view of a through road to his right was obstructed, thus imposing on him an additional burden of care to stop at point near the stop sign where he could make an effective observation of travel on such road before entering the traveled portion of that through highway, was sufficient to present an issue for determination by the jury as to whether the conduct of the defendant constituted the driving of his automobile "in reckless disregard of the safety of others" where death of two passengers in automobile on through highway was caused when car in which they were riding was struck on the left side by the car driven by defendant. *State v. Pappe*, 83 Idaho 358, 362 P.2d 1083 (1961).

Speed.

In a prosecution of motorist for manslaughter, the testimony of drivers of automobiles which defendant attempted to pass, and parties working in fields and residing near the scene of the accident, regarding speed, was admissible. *State v. Monteith*, 53 Idaho 30, 20 P.2d 1023 (1933).

Collateral References. Wanton or reckless use of firearm without express intent to inflict injury. 5 A.L.R. 603; 23 A.L.R. 1554.

Homicide in attempting to prevent elope-
ment. 8 A.L.R. 660.

Homicide in connection with use of automo-
bile for unlawful purpose or in violation of
law. 16 A.L.R. 914; 21 A.L.R. 1504; 27 A.L.R.
1182; 30 A.L.R. 66; 41 A.L.R. 725; 42 A.L.R.
1120; 46 A.L.R. 1060; 49 A.L.R. 608; 53 A.L.R.
254; 59 A.L.R. 695; 99 A.L.R. 756.

Discharge of firearm without intent to in-
flict injury as proximate cause of homicide
resulting therefrom. 55 A.L.R. 921.

Negligent homicide as affected by negli-
gence or other misconduct of the decedent. 67
A.L.R. 922.

Airplane, manslaughter by negligence in
handling. 69 A.L.R. 337.

Automobile, contributory negligence as de-
fense in prosecution for homicide in connec-
tion with use of. 99 A.L.R. 833.

Test or criterion of term "culpable negli-

gence," or "gross negligence," appearing in
statute defining or governing manslaughter.
161 A.L.R. 10.

Sleep or drowsiness of operator of automo-
bile as affecting charge of negligent homicide.
63 A.L.R.2d 983.

Criminal homicide by excessive or improper
punishment inflicted upon child by parent or
one in loco parentis. 89 A.L.R.2d 396.

Failure to provide medical or surgical at-
tention. 100 A.L.R.2d 483.

Physician's or surgeon's negligence, mis-
take, or lack of skill as affecting liability of
one causing personal injury. 100 A.L.R.2d
769; 100 A.L.R.2d 808.

Homicide: Improper treatment of disease.
45 A.L.R.3d 114.

Criminal liability for injury or death caused
by operation of pleasure boat. 8 A.L.R.4th
886.

18-4007. Punishment for manslaughter. — Manslaughter is punish-
able as follows:

1. Voluntary—by a fine of not more than fifteen thousand dollars
(\$15,000), or by a sentence to the custody of the state board of correction not
exceeding fifteen (15) years, or by both such fine and imprisonment.

2. Involuntary—by a fine of not more than ten thousand dollars
(\$10,000), or by a sentence to the custody of the state board of correction not
exceeding ten (10) years, or by both such fine and imprisonment.

3. Vehicular—in the operation of a motor vehicle:

(a) For a violation of section 18-4006 3.(a), Idaho Code, by a fine of not
more than ten thousand dollars (\$10,000), or by a sentence to the custody
of the state board of correction not exceeding ten (10) years, or by both
such fine and imprisonment.

(b) For a violation of section 18-4006 3.(b), Idaho Code, by a fine of not
more than fifteen thousand dollars (\$15,000), or by a sentence to the
custody of the state board of correction not exceeding fifteen (15) years, or
by both such fine and imprisonment.

(c) For a violation of section 18-4006 3.(c), Idaho Code, by a fine of not
more than two thousand dollars (\$2,000), or by a jail sentence not
exceeding one (1) year, or by both such fine and jail sentence.

(d) In addition to the foregoing, any person convicted of a violation of
section 18-4006 3., Idaho Code, which resulted in the death of the parent
or parents of minor children may be ordered by the court to pay support
for each such minor child until the child reaches the age of eighteen (18)
years. Support shall be established in accordance with the child support
guidelines then in effect, and the nonpayment of such support shall be
subject to enforcement and collection by the surviving parent or guardian
of the child in the same manner that other child support orders are
enforced as provided by law. In no event shall the child support judgment
or order imposed by the court under this section be paid or indemnified by
the proceeds of any liability insurance policy.

(e) In addition to the foregoing, the driver's license of any person
convicted of a violation of section 18-4006 3., Idaho Code, may be

suspended for a time determined by the court. [I.C., § 18-4007, as added by 1983 (Ex. Sess.), ch. 3, § 19, p. 8; am. 1992, ch. 33, § 1, p. 97; am. 1994, ch. 413, § 1, p. 1301; am. 1997, ch. 311, § 1, p. 922; am. 2002, ch. 356, § 1, p. 1013.]

Legislative Intent and Purpose. Section 1 of S.L. 1983 (Ex. Sess.), ch. 3 read: "The use of the public highways of this state is a privilege granted by the state for the enjoyment and well being of all citizens. It is a privilege, and not a right. In order to make sure that this privilege is not abused, it is necessary that such privilege be controlled or restricted, and appropriate fines, jail terms and evaluation of offenders be provided for. It is the purpose of the several sections of law contained within this act to provide the necessary administrative and judicial procedures to insure that the highways are safe for travel by law-abiding citizens, to restrict or control the use of the highways by those persons who cannot or will not conform their actions to the accepted standards of civilized behavior, and to punish those malfeasors who, after due process of law, are convicted of criminal acts. In addition to the substantial amendments provided for in this act, it is the intent of the Idaho state legislature to provide:

"First, that those who abuse the privilege of driving upon the highways while under the influence of alcohol, drugs or other intoxicating substances shall be viewed by the judiciary as a serious threat to the health and safety of law abiding users of the highways.

"Second, that the mandatory evaluations provided for in this act be used by the sentencing judge to require those who have been identified as abusers to receive counseling and treatment at their own expense. "Third, as an integral part of any sentence, the legislature intends that the court consider public service as a part of the overall sentence. Public service is an important consideration in the overall intent of this legislature. It is also intent that this alternative be used totally at the expense of the defendant.

"Fourth, where there has been damage to other individuals, a loss of property, or other financial consequence to victims of those who abuse the use of alcohol, drugs, or other intoxicating substances, it is the intent of this legislature that any sentence provide for restitution, as appropriate, to make the victims whole.

"Fifth, a period of incarceration is appropriate to deter the abuse of alcohol, drugs or other intoxicating substances. This is true, even with those that are first-time offenders; however, it is recognized that in certain special cases incarceration would not be

appropriate, so it is legislative intent to leave incarceration of the first-time offender to the discretion of the court, but to mandate incarceration for repeat offenders. "Sixth, the fines in all areas of this act have been substantially increased to bring the level of fines imposed to a more realistic level. It is legislative intent that fines be imposed as part of the sentence in an amount that reflects the seriousness of the crimes provided for in this act.

"And last, that loss of driving privileges be vigorously enforced whenever indicated by the provisions of this act, and additionally, when the court deems appropriate. In all of this, the legislature has tried to carefully balance the rights of the individual who is accused or convicted of wrongdoing against the rights of all other citizens, who desire nothing more than to be safe and secure in their use of the public highways."

Section 20 of 1983 (Ex. Sess.), ch. 3 as amended by § 1 of S.L. 1985, ch. 36 read: "It is legislative intent that any federal moneys that come to the state of Idaho as a result of the passage of this act, with its emphasis on the increased penalties for conviction of driving while under the influence, pursuant to the provisions of P.L. 97-364, shall be transferred, and distributed as follows, and any such amounts are hereby appropriated:

"(1) One-third ($\frac{1}{3}$) of all such moneys shall be utilized by the department of law enforcement for traffic safety programs;

"(2) One-third ($\frac{1}{3}$) of all such moneys shall be paid to the various counties, in the same manner as moneys are distributed to counties under the provisions of section 40-405A(2)(c) (repealed), Idaho Code, for traffic safety programs; and

"(3) One-third ($\frac{1}{3}$) of all such moneys shall be paid to the various cities which maintain a city police force, in the same manner as moneys are distributed to cities under the provisions of section 40-405A(1) (repealed), Idaho Code, for traffic safety programs."

Compiler's notes. Former § 18-4007 was repealed and a new § 18-4007 enacted by S.L. 1983, ch. 145, §§ 18 and 19, effective July 1, 1983. However, ch. 145 was repealed by § 21 of S.L. 1983 (Ex. Sess.), ch. 3, effective May 19, 1983.

Another former § 18-4007 which comprised I.C., § 18-4007, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1983 (Ex. Sess.), ch. 3, § 18, effective May 19, 1983.

Another former § 18-4007, comprising Cr.

& P. 1864, § 22; R.S., R.C., & C.L., § 6566; C.S., § 8215; I.C.A., § 17-1107; am. S.L. 1949, ch. 126, § 2, p. 221; am. S.L. 1957, ch. 114, § 1, p. 193; am. S.L. 1965, ch. 136, § 3, p. 268, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Section 22 of S.L. 1983 (Ex. Sess.), ch. 3 declared an emergency and provided that the act should be in full force and effect on and after July 1, 1983. Approved May 19, 1983.

Cited in: *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941); *State v. Musquiz*, 96 Idaho 105, 524 P.2d 1077 (1974); *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980); *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984); *State v. Tisdale*, 107 Idaho 481, 690 P.2d 936 (Ct. App. 1984); *Simons v. State*, 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989); *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989).

ANALYSIS

Self-defense.

Sentence.

—Reasonable.

Vehicular.

Self-Defense.

Even if the jury found that defendant acted, at least initially, in self-defense, that finding would not necessarily be inconsistent with the trial judge's sentencing remarks that he did not feel self-defense was an issue in the case; thus, the trial judge did not abuse his sentencing discretion by ignoring the jury's findings on self-defense, and, instead, substituting his own contrary finding. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Sentence.

—Reasonable.

An abuse of sentencing discretion occurs if the sentence is unreasonable, but the sentence is reasonable if it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Flores*, 108 Idaho 914, 702 P.2d 1374 (Ct. App. 1985).

The district court did not abuse its discretion in sentencing defendant, an illegal alien who intentionally shot a coworker after allegedly being threatened by the victim, to a determinate sentence of 15 years upon a plea of guilty to voluntary manslaughter. *State v. Beltran*, 109 Idaho 196, 706 P.2d 85 (Ct. App. 1985).

If, in light of the facts, the sentence is reasonable, the court then considers whether the period of confinement under the sentence is reasonable. Where defendant was sentenced to an indeterminate term of 15 years for manslaughter and to a consecutive inde-

terminate life term for first degree murder, a period of confinement for at least 15 years was not unreasonable. *State v. Plumley*, 109 Idaho 369, 707 P.2d 480 (Ct. App. 1985).

Where the killings of two peace officers were totally unjustified and were accomplished with little or no remorse, the imposition of two consecutive ten-year terms was not unreasonable or an abuse of discretion. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Where the defendant had a propensity for violence when intoxicated, two consecutive fixed sentences of ten years for the killing of two persons were not an abuse of discretion. *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

The defendant's ten-year indeterminate sentence for involuntary manslaughter was not an abuse of the district court's discretion, where the crime involved a high degree of negligence. *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

Where the defendant precipitated a fight with the victim and as a result, while the victim lay prone and defenseless on the ground, the defendant rained multiple, savage shoe and boot blows to the victim's face, and the defendant had a long history of incorrigible antisocial behavior, the determinate sentence of 15 years for voluntary manslaughter was reasonable. *State v. Griffith*, 114 Idaho 95, 753 P.2d 831 (Ct. App. 1988).

The defendant's seven-year indeterminate sentence for vehicular manslaughter was not an abuse of discretion where the presentence investigation disclosed three prior misdemeanor driving under the influence convictions, yet he had made no effort to undergo treatment. *State v. Hinojosa*, 114 Idaho 621, 759 P.2d 912 (Ct. App. 1988).

In view of defendant's past record of convictions for alcohol-related offenses and the need to protect society from future harm, relying on the 20-year pattern of the defendant's misuse of alcohol and the fact that a death occurred in this instance, the judge determined that a period of confinement was required and the court acted within its statutory discretion in sentencing the defendant to an indeterminate term of seven years, with four years fixed. *State v. Howard*, 119 Idaho 100, 803 P.2d 1006 (Ct. App. 1990).

Where defendant was sentenced to a two year fixed sentence followed by an indeterminate term of four years as the result of being convicted of causing the death of an infant by shaking the child, the public interest in punishing a serious offense, one involving unprovoked violence upon a human being causing his death, amply justified the two-year minimum sentence of confinement imposed in this case. Additionally, the term of confinement furthers the substantive goal of deter-

rence—specific deterrence, and as defendant's wife was pregnant at the time of sentencing, the sentence thus may be viewed as reflecting society's interest in protecting other infants from the type of dangerous acts which the jury found to have been committed upon the victim. *State v. Ojeda*, 119 Idaho 862, 810 P.2d 1148 (Ct. App. 1991).

Defendant's sentence of a ten-year term of confinement followed by a five-year indeterminate term, for a conviction of voluntary manslaughter, was reasonable where the defendant deliberately shot into a house in which he knew the victim was standing, had been drinking, had a long history of alcohol abuse, and had a series of other convictions. *State v. Gunderson*, 120 Idaho 97, 813 P.2d 908 (Ct. App. 1991).

A 15-year fixed sentence for conviction of voluntary manslaughter was not excessive, even though it was the maximum term of confinement possible and in spite of the defendant's efforts of rehabilitation and lack of prior felonies on his record. *State v. Romero*, 120 Idaho 261, 815 P.2d 459 (1991).

The district court acted within the bounds of its discretion in imposing the maximum sentences on defendant who pled guilty to two counts of vehicular manslaughter and three counts of aggravated driving while under the influence of alcohol. *State v. Tousingnant*, 123 Idaho 22, 843 P.2d 172 (Ct. App. 1992).

Defendant's unified sentence of 14 years with a minimum three-year term of incarceration for burglary, grand theft, and malicious injury to property was not excessive where defendant, after breaking into his employer's building and stealing a wrecker, led police on a dangerous, high-speed chase that ended only when he crashed the truck into a police blockade. *State v. Tucker*, 123 Idaho 374, 848 P.2d 432 (Ct. App. 1993).

Where the defendant took no action to help the victim or to deter others from inflicting harm on him, and where he watched the shooting and took part in transporting the victim's body and in digging a grave, there

was no abuse of discretion in sentencing the defendant to serve a ten-year determinate term. *State v. Barnett*, 133 Idaho 231, 985 P.2d 111 (1999).

Vehicular.

Where the defendant drove his pickup truck into the wrong lane of a two-way highway and struck a vehicle containing three occupants, two of whom died from the impact, he was found to have a blood-alcohol level of .19 percent, and he had a prior record of driving under the influence, a fixed-term sentence of seven years and a consecutive, indeterminate sentence of seven years for two counts of vehicular manslaughter were not excessive. *State v. Lee*, 111 Idaho 489, 725 P.2d 194 (Ct. App. 1986).

The court did not abuse its discretion in imposing a fixed seven-year sentence for vehicular manslaughter, where the judge expressly stated that the maximum term was being imposed to protect society for the maximum period, to deter the defendants and others from similar acts, and as a reflection of the seriousness of the crime. *State v. Puga*, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986).

A reading of the sentencing provisions set forth in this section makes it clear that a court-imposed license suspension for a violation of § 18-4006(3) is unauthorized and hence "illegal." It should be noted, however, that under the provisions of I.C. § 49-325(1), the Idaho Transportation Department has the authority to revoke the driving privileges of an individual convicted of § 18-4006(3). *State v. Howard*, 122 Idaho 9, 830 P.2d 520 (1992).

Defendant's sentence suspending his driver's license for life was not illegal because under this section there is no express limitation on the period for which a defendant's driver's license can be revoked. *State v. Edghill*, 134 Idaho 218, 999 P.2d 255 (Ct. App. 2000).

This section permits a lifetime suspension of driving privileges for a defendant convicted of vehicular manslaughter. *State v. Baker*, 136 Idaho 576, 38 P.3d 614 (2001).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Appeal.

Excessive penalty.
Instructions to jury.
Motor vehicle operation.
Partial repeal of section.

Appeal.

Where defendant had been convicted, on guilty plea, of assault with intent to murder and subsequently, after death of the assault victim, was convicted of voluntary manslaughter, the conviction for assault with in-

tent to murder would not be set aside on the theory that there had been a merger into the voluntary manslaughter conviction where defendant appealed only the conviction and sentence for voluntary manslaughter. *State v. Brusseau*, 96 Idaho 558, 532 P.2d 563 (1975).

Excessive Penalty.

Trial court abused discretion in assessing both maximum fine and maximum sentence on conviction for involuntary manslaughter arising out of death in traffic accident where record did not present circumstances of aggravation and fine should be remitted. *State*

v. Weise, 75 Idaho 404, 273 P.2d 97 (1954).

Maximum sentence of ten years was within the statutory limits for involuntary manslaughter. *State v. Sanchez*, 94 Idaho 125, 483 P.2d 173 (1971).

A trial court did not abuse its discretion by sentencing a man convicted of involuntary manslaughter to a prison term not to exceed ten years. *State v. Thacker*, 98 Idaho 369, 564 P.2d 1278 (1977).

Where the defendant pleaded guilty to voluntary manslaughter, the trial court did not abuse its discretion in imposing the maximum sentence of ten years. *State v. Allen*, 98 Idaho 782, 572 P.2d 885 (1977).

Where the defendant, upon his conviction of voluntary manslaughter, received a sentence of an indeterminate period not exceeding six years, for shooting to death his son-in-law who had entered his home drunk and threatened the father-in-law, the sentence was not too harsh despite the defendants advanced age, declining physical condition, and lack of a prior criminal record, because probation would not measure up to the severity of the offense of intentionally taking another's life. *State v. Baker*, 103 Idaho 43, 644 P.2d 365 (Ct. App. 1982).

Instructions to Jury.

There was no prejudicial error in instructing the jury that the penalty for manslaughter was "proportionately lenient." *State v. Anstine*, 91 Idaho 169, 418 P.2d 210 (1966).

Motor Vehicle Operation.

By the enactment of the negligent homicide statute as a part of the Uniform Act Regulating Traffic on Highways, it would appear the legislature intended to, and it did legislate anew in the field of homicide resulting from the improper operation of motor vehicles; that

by such legislation the legislature intended to remove from the purview of the earlier involuntary statute, such classification of homicide, and to place it within the purview of the later negligent homicide statute. It appears that the legislature thereupon repealed the manslaughter statute insofar as it included within its purview homicide resulting from the improper operation of motor vehicles and immediately thereupon enacted the negligent homicide statute including thereunder the subject matter of homicide so resulting, with redefinition of penalty therefor. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957) (decision prior to 1965 amendment).

Partial Repeal of Section.

The conflict between the involuntary manslaughter statute imposing a sentence of imprisonment not exceeding ten years in the state prison and the negligent homicide statute imposing a sentence of imprisonment not exceeding one year without designating the state prison or the county jail cannot be reconciled, and that being so, the negligent homicide statute must govern since it is the later enactment. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957) (decision prior to 1965 amendment).

The Uniform Act Regulating Traffic on Highways is a comprehensive statute, legislatively intended to cover the whole field and subject matter of the operation of motor vehicles, including definitions of the several offenses growing out of the improper operation of such vehicles, prescribing penalties for those offenses, and repealing by implication all acts and parts of acts inconsistent therewith. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957) (decision prior to 1965 amendment).

18-4008. Death must occur when. [Repealed.]

Compiler's notes. Former § 18-4008, which comprised I.C., § 18-4008, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 2000, ch. 276, § 1, effective April 14, 2000.

A former section, which comprised Cr. & P.

1864, § 23; R.S., R.C., & C.L., § 6567; C.S., § 8216; I.C.A., § 17-1108, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4009. Justifiable homicide by any person. — Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
2. When committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace. [I.C., § 18-4009, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 25; R.S., R.C., & C.L., § 6570; C.S., § 8219; I.C.A., § 17-1111, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. State prison guard killing or wounding prisoner, § 20-111.

Cited in: State v. Willis, 24 Idaho 252, 132 P. 962 (1913); State v. Jurko, 42 Idaho 319, 245 P. 685 (1926); State v. Baker, 103 Idaho 43, 644 P.2d 365 (Ct. App. 1982); Idaho v. Horiuchi, 253 F.3d 359 (9th Cir. 2001); State v. Turner, 136 Idaho 629, 38 P.3d 1285 (Ct. App. 2001).

ANALYSIS

Attack after retreat.
 Defense of wrong-doer.
 Evidence.
 First degree murder.
 Instructions.
 Protection of property.
 Question for jury.
 Self-defense in general.

Attack After Retreat.

Where defendant continued to shoot at victim, who had threatened defendant's family with a gun, even after victim had retreated, there was substantial and competent evidence to support jury's conclusion that defendant was guilty of voluntary manslaughter. State v. Carter, 103 Idaho 917, 655 P.2d 434 (1981).

Defense of Wrong-doer.

Private citizen can not interfere between two persons, both of whom are in the wrong, and slay one to save the other. Territory v. Evans, 2 Idaho (Hasb.) 425, 17 P. 139 (1888).

Evidence.

Where defendant seeks to show the superior physical strength of deceased as compared with his own, evidence should be con-

finied to the strength of each at time of the homicide. State v. Crea, 10 Idaho 88, 76 P. 1013 (1904).

Evidence tending to show that defendant was behind bar of saloon and could not retreat was erroneously rejected. State v. Crea, 10 Idaho 88, 76 P. 1013 (1904).

Under plea of self-defense character evidence for defendant is admissible bearing on question of his honest and conscientious belief that his acts were necessary to protect his life or person. State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909).

First Degree Murder.

Where defendants entered store for purpose of committing armed robbery, and one defendant displayed a gun and stated it was a holdup but retreated as proprietor advanced with meat cleaver and after giving warning shots fired again and killed proprietor the defendants were guilty of first degree murder. State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971).

Instructions.

Part of instruction in homicide case was as follows: "If you are satisfied from the evidence beyond a reasonable doubt, that the defendant killed the deceased in necessary self-defense ***, then you should return a verdict of not guilty." So much of this as requires jury to be satisfied beyond reasonable doubt is erroneous. State v. Schieler, 4 Idaho 120, 37 P. 272 (1894).

Instruction on self-defense, that conditions under which it may be asserted are "that the party himself was not the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before he struck the blow or fired the fatal shot; second, that the striking or shooting was necessary to prevent the infliction upon himself of a great bodily injury by the party stricken or shot," correctly states the law. State v. Lyons, 7 Idaho 530, 64 P. 236 (1901).

In prosecution for murder in which defendant pleaded self-defense it was not error to instruct jury that they could consider the fact of defendant's flight after the killing in determining probabilities of his guilt or innocence. *State v. Lyons*, 7 Idaho 530, 64 P. 236 (1901).

The following instruction is erroneous: "Before a party can justify the taking of life in self-defense he must show that there was reasonable ground for believing that he was in great peril and that the killing was necessary for his escape and that no other safe means was open to him. When one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack if he can safely do so; and the right of self-defense does not arise until he has done everything in his power to avoid this necessity." *State v. McGreevey*, 17 Idaho 453, 105 P. 1047 (1909).

State v. Fleming, 17 Idaho 471, 106 P. 305 (1910).

Where two instructions are given upon self-defense, and such instructions together state the law upon that subject, case will not be reversed upon the assumed error that court assumes and charges upon a theory not raised or indicated by evidence. *State v. Willis*, 24 Idaho 252, 132 P. 962 (1913).

The following instruction substantially states correct rule of law and should ordinarily be given in murder case where plea is self-defense: "The court instructs the jury as a matter of law that a person need not be in actual, imminent peril of his life or of great bodily harm before he may assault his assailant; it is sufficient if in good faith he has a good and reasonable belief from the facts as they appear to him at the time that he is in such imminent peril." *State v. Fondren*, 24 Idaho 663, 135 P. 265 (1913).

Instruction that defendant must first in good faith decline further combat before he can successfully plead self-defense, no matter how savage, dangerous, and unprovoked attack may be, is not in harmony with law of self-defense as laid down in statutes. *State v. Grover*, 35 Idaho 589, 207 P. 1080 (1922).

Instruction defining justifiable homicide in language of this section with word "also" omitted is proper. *State v. Jurko*, 42 Idaho 319, 245 P. 685 (1926).

The following instruction is properly phrased: "A bare fear of being killed or of receiving great bodily harm is not sufficient to justify an assault with a deadly weapon. It must appear that the circumstances were sufficient to excite the fear of a reasonable person, similarly situated, acting in good faith, and viewing the situation and circumstances from his standpoint ***." *State v. Bush*, 50 Idaho 166, 295 P. 432 (1930).

An instruction in a homicide case is incorrect when based on §§ 19-202 and 19-203,

which give the right to use resistance sufficient to prevent the offense, since the law relevant to a homicide case is § 18-4009, which permits self-defense with a deadly weapon where accused has reasonable cause to believe he is in danger of "great bodily injury" or where the person being defended is in similar danger. *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969).

Protection of Property.

Person has at least as much and possibly more protection in law in defending his property as he does in the protection of his person. *People v. Pierson*, 2 Idaho (Hasb.) 76, 3 P. 688 (1884).

Mere civil trespass on land, unaccompanied by any act amounting to a crime, or any intention to commit a crime, will not justify the shooting of trespasser. *State v. Dixon*, 7 Idaho 518, 63 P. 801 (1901).

Question for Jury.

Once the victim has retreated and the danger is abated, the privilege of self-defense expires. However, whether a retreat by the victim is sufficient to abate the danger, reasonable apprehension, and necessity supporting the privilege of self-defense is a question properly left to the jury. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981).

Self-defense in General.

Law of self-defense requires only that person must act as a reasonable and prudent man would be likely to act under similar conditions and circumstances. *State v. McGreevey*, 17 Idaho 453, 105 P. 1047 (1909).

Collateral References. Duty to retreat as affected by illegal character of premises on which homicide occurs. 2 A.L.R. 518.

Experiments to determine distance from which pistol or gun was fired as bearing upon issue of self-defense. 8 A.L.R. 47; 85 A.L.R. 479.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter. 10 A.L.R. 861.

Third person, killing of, by shot or blow aimed at another in self-defense. 18 A.L.R. 917.

Duty to retreat when not on one's premises. 18 A.L.R. 1279.

Homicide in defense of habitation or property. 25 A.L.R. 508; 32 A.L.R. 1541; 34 A.L.R. 1488.

Humanitarian motives for homicide. 25 A.L.R. 1007.

Evidence of improper conduct by deceased toward defendant's wife as admissible in support of plea of self-defense. 44 A.L.R. 860.

Evidence of experience with intruders on other occasions as admissible on issue of justification in defending premises. 45 A.L.R. 1418.

Officer attempting illegal arrest, right of self-defense by. 46 A.L.R. 904.

Husband and wife, right of self-defense as affected by fact that defendant was in company with assailant's spouse. 9 A.L.R.3d 933.

Duty to retreat as condition of self-defense

when one is attacked at his office or place of business or employment. 41 A.L.R.3d 584.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

18-4010. Fear not sufficient justification. — A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone. [I.C., § 18-4010, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 26; R.S., R.C., & C.L., § 6571; C.S., § 8220; I.C.A., § 17-1112, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Instructions.

Instruction that there must be danger of personal injury or fear of personal injury to that extent that the only means of avoiding loss of life or great personal injury is to kill assailant is proper. *People v. Bernard*, 2 Idaho (Hasb.) 193, 10 P. 30 (1886).

Instruction setting out § 18-4009, and quoting this section except for words "of any" following word "commission" in second line, is not erroneous. *State v. Jurko*, 42 Idaho 319, 245 P. 685 (1926).

Collateral References. Duty to retreat as affected by illegal character of premises on which homicide occurs. 2 A.L.R. 518.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter. 10 A.L.R. 861.

Third person, killing of, by shot or blow aimed at another in self-defense. 18 A.L.R. 928.

Duty to retreat when not on one's premises. 18 A.L.R. 1279.

Homicide in defense of habitation or property. 25 A.L.R. 508; 32 A.L.R. 1541; 34 A.L.R. 1488.

Humanitarian motives for homicide. 25 A.L.R. 1007.

Evidence of improper conduct by deceased toward defendant's wife as admissible in support of plea of self-defense. 44 A.L.R. 860.

Evidence of experience with intruders on other occasions as admissible on issue of justification in defending premises. 45 A.L.R. 1418.

Officer attempting illegal arrest, right of self-defense by. 46 A.L.R. 904.

Husband and wife, right of self-defense as affected by fact that defendant was in company with assailant's spouse. 9 A.L.R.3d 933.

Duty to retreat as condition of self-defense when one is attacked at his office or place of business or employment. 41 A.L.R.3d 584.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

18-4011. Justifiable homicide by officer. — Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either:

1. In obedience to any judgment of a competent court; or
2. When reasonably necessary in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty including suppression of riot or keeping and preserving the peace. Use of deadly force shall not be justified in overcoming actual resistance unless the officer has probable cause to believe that the resistance poses a threat of death or serious physical injury to the officer or to other persons; or
3. When reasonably necessary in preventing rescue or escape or in retaking inmates who have been rescued or have escaped from any jail, or

when reasonably necessary in order to prevent the escape of any person charged with or suspected of having committed a felony, provided the officer has probable cause to believe that the inmate, or persons assisting his escape, or the person suspected of or charged with the commission of a felony poses a threat of death or serious physical injury to the officer or other persons. [I.C., § 18-4011, as added by 1972, ch. 336, § 1, p. 844; am. 1986, ch. 303, § 2, p. 754.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 28, 29; R.S., R.C., & C.L., § 6569; C.S., § 8218; I.C.A., § 17-1110, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 1 of S.L. 1986, ch. 303 is compiled as § 19-610.

Cross ref. Force permitted to be used in effecting arrest, § 19-610.

Sec. to sec. ref. This section is referred to in § 19-610.

Collateral References. Misdemeanor, degree of force that may be employed in arrest-

ing one charged with. 3 A.L.R. 1170; 42 A.L.R. 1200.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter. 10 A.L.R. 861.

Self-defense, carelessness in exercising right of, which results in unintentional killing of third person. 18 A.L.R. 928.

Peace officers' criminal responsibility for killing or wounding one whom they wished to investigate or identify. 18 A.L.R. 1368; 61 A.L.R. 321.

Officer attempting illegal arrest, right of self-defense by. 46 A.L.R. 904.

18-4012. Excusable homicide. — Homicide is excusable in the following cases:

1. When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat when no undue advantage is taken nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner. [I.C., § 18-4012, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 30; R.S., R.C., & C.L., § 6568; C.S., § 8217; I.C.A., § 17-1109; am. S.L. 1963, ch. 109, § 1, p. 332, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: State v. Willis, 24 Idaho 252, 132 P. 962 (1913); State v. Jurko, 42 Idaho 319, 245 P. 685 (1926).

ANALYSIS

Culpable negligence.
Instructions.

Culpable Negligence.

The reference to "culpable negligence" in § 18-201 is simply a reiteration of the excusable homicide standard under this section. It does not preclude imposition of criminal responsibility for negligence under § 18-4006.

Haxforth v. State, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

Instructions.

It was not error where the court failed to instruct jury on excusable homicide in the absence of request for same and evidence to justify such instruction. State v. Miller, 65 Idaho 756, 154 P.2d 147 (1944).

Since defendant had burden to establish mitigation in homicide prosecution, he also had burden to request instruction on excusable homicide if such was desired. State v. Miller, 65 Idaho 756, 154 P.2d 147 (1944).

Use of legislative words, usual and ordinary caution, in charge by court where defendant was prosecuted for involuntary manslaughter, as a result of an automobile collision, was not error though it authorized a conviction based on evidence of only ordinary negligence. State v. Ayres, 70 Idaho 18, 211 P.2d 142 (1949).

Where undisputed evidence showed defen-

dant was driving at a high rate of speed while under the influence of intoxicating liquor when boy on bicycle was hit and killed, and essence of the former section was urged as a defense to manslaughter charge, an instruction embodying the principles of the former section and former § 19-2112 should have been given but failure to do so was not prejudicial, since jury could have returned no other verdict but guilty. *State v. Deane*, 75 Idaho 149, 268 P.2d 1114 (1954).

Instruction as to the conditions which must be present before a homicide can be held to be excusable is proper except where it contains a sentence which relieves the state from establishing criminal negligence, required to support a conviction of negligent homicide. *State v. Cox*, 82 Idaho 150, 351 P.2d 472 (1960).

Where instruction was favorable to defendant consonant with his theory of defense, excusable homicide, defendant had no cause to complain. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960).

An instruction that no appreciable space of time between the intention to kill and the act of killing was required to constitute premeditation where "sudden passion," "heat of

blood," "reasonable provocation," and "deliberately" were correctly defined in other instructions was not erroneous. *State v. Koho*, 91 Idaho 450, 423 P.2d 1004 (1967).

Where there was no evidence to show that the defendant had a sudden and sufficient provocation for striking the victim, and the evidence showed such striking was intentional and continuous, rather than by accident or misfortune, the trial court did not err in failing to give the excusable homicide instruction requested by the defendant. *State v. Pennell*, 108 Idaho 669, 701 P.2d 289 (Ct. App. 1985).

Collateral References. Elopement, homicide in attempting to prevent. 8 A.L.R. 660.

Homicide as affected by humanitarian motives. 25 A.L.R. 1007.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom. 55 A.L.R. 921.

Animal, criminal responsibility for shooting one mistaken for. 23 A.L.R.2d 1401.

Child, criminal homicide by excessive or improper punishment of. 89 A.L.R.2d 396.

Improper treatment of disease. 45 A.L.R.3d 114.

18-4013. Discharge of defendant when homicide justifiable or excusable. — The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged. [I.C., § 18-4013, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 32; R.S., R.C., & C.L., § 6572; C.S., § 8221; I.C.A., § 17-1113, was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4014. Administering poison with intent to kill. — Every person who, with intent to kill, administers or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than ten (10) years, and the imprisonment may be extended to life. [I.C., § 18-4014, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 42; R.S., R.C., & C.L., § 6597; C.S., § 8229; I.C.A., § 17-1114, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Poisoning food, drink, medicines, springs, wells or reservoirs, § 18-5501.

Sec. to sec. ref. This section is referred to in §§ 18-310, 19-5307 and 20-525A.

Cited in: *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987).

18-4015. Assault with intent to murder. — Every person who assaults another with intent to commit murder, is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years. [I.C., § 18-4015, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 47; R.S., R.C., & C.L., § 6598; C.S., § 8230; I.C.A., § 17-1115, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-7803, 18-7905, 19-2520, 19-5307 and 20-525A.

Cited in: *Ex parte Cox*, 3 Idaho 530, 32 P. 197, 95 Am. St. R. 29 (1893); *In re Chase*, 18 Idaho 561, 110 P. 1036 (1910).

ANALYSIS

Degrees.

Evidence.

Included offense.

Indictment or information.

In general.

Instructions.

Intent.

Premeditation.

Sentence.

Degrees.

Assault with intent to commit murder has only one punishment and does not contain two degrees. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Evidence.

In trial of defendant charged with assault with intent to commit murder the evidence must be sufficient to convince jury that assault was made with intent to commit murder, and with malice aforethought. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Where evidence showed in trial of defendant charged with attempt to commit murder that defendant pointed a loaded gun at complaining witness, who was within range of bullet fired from gun, and said "give me my cigarette lighter or I will kill you" and promptly fired when complaining witness said he didn't have the lighter was sufficient to justify verdict of guilty. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Notwithstanding a contradictory diagram of the scene, there was substantial and competent evidence to sustain the jury's verdict, where the state's case included testimony by three witnesses, including the victim, which supported the finding that defendant fired the shot that struck the victim, and further, an acquaintance of the defendant testified that he admitted shooting the victim. *State v. Lopez*, 100 Idaho 99, 593 P.2d 1003 (1979).

Where the evidence showed that a security officer was patrolling his employer's property when he observed a van parked on the company property, that he shined the patrol vehicle's spotlight into a van on the property in response to movement, that he exited his

patrol car and observed a man coming from the back of the van to the front with gun in hand, that officer tried to tell his assailant he was unarmed, that the assailant fired from inside the van, wounding the officer in the neck and knocking him down, that the assailant exited the van, walked over to the officer, looked at him, returned to the van and drove off, that the officer was able to describe defendant to police and identify his picture, that defendant was arrested shortly thereafter, and that tests showed defendant had held a handgun with both hands and fired it not more than two hours previously, the evidence was sufficient to sustain a conviction for assault with intent to murder. *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979).

Included Offense.

The language of the charging part of the information, of "assault with intent to commit murder" as considered in this case, is sufficient to charge "assault with a deadly weapon," an included offense pursuant to § 19-2312; it clearly appears that the intent of appellant to do what the jury found he did is sufficiently established by the commission of the acts and circumstances surrounding them. *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963).

An information alleging facts constituting both assault with a deadly weapon and assault with intent to commit murder and entitled "Assault With a Deadly Weapon With Intent to Murder" was sufficient to charge assault with intent to commit murder and, upon proof of such facts, to warrant a conviction of such charge. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Indictment or Information.

Information held sufficient. *State v. Dixon*, 7 Idaho 518, 63 P. 801 (1901).

An information charging an assault with an attempt to commit murder, does not necessarily include an assault with a deadly weapon, or instrument, or assault by means and force likely to produce great bodily injury. *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

In General.

Conviction sustained. *State v. Grigg*, 25 Idaho 405, 137 P. 371, 138 P. 506 (1914).

Instructions.

Where trial court instructed the jury that the crime of assault with intent to commit murder necessarily includes the following lesser offenses: attempted manslaughter; assault with a deadly weapon; assault; exhibition or use of a deadly weapon; discharging firearms at another, and aiming firearms at another, which six lesser included offenses

were set out separately in the instruction with the elements of each offense being clearly stated, the crimes listed as lesser included offenses were not so numerous as to confuse or mislead the jury, nor was defendant's right to equal protection of the laws violated by the trial court's instruction on grounds that the classifications were unreasonable and without a rational basis. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982).

Intent.

Intent of defendant to kill complaining witness was not negated as a matter of law where complaining witness was close enough to defendant to be hit by bullet fired from defendant's gun. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Premeditation.

Premeditation is not an essential element of crime of assault with intent to commit murder. *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953).

Sentence.

Where defendant abducted the victim at gunpoint from her car, struck her on the head when she refused to disrobe, and shot her twice when she attempted to escape, consec-

utive sentences for the maximum term of confinement on respective counts of second degree kidnapping, assault with intent to commit infamous crime against nature, attempt to commit infamous crime against nature, and assault with intent to commit murder were not excessive. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Where the evidence showed the defendant had fired a two-hand shot with a pistol through the window of his van, which shot struck an unarmed man in the neck and at close range, then exited the van and examined the victim from as close as three feet before returning to his van and driving off, the violence involved in the commission of the crime alone would justify imposition of the maximum sentence of 14 years under this section, notwithstanding his prior nonviolent record, which showed only two prior misdemeanor convictions, favorable psychological report, the fact he had been honorably discharged from the Army, was married with seven children, aged eight to 18, and had regularly worked from discharge from Army until his arrest for the assault with intent to commit murder. *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979).

18-4016. Definition of human embryo and fetus — Prohibiting the prosecution of certain persons. — (1) For purposes of this chapter "embryo" or "fetus" shall mean any human in utero.

(2) Nothing in this chapter, arising from the killing of an embryo or fetus, shall be construed to permit the prosecution:

(a) Of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(b) Of any person for any medical treatment of the pregnant woman or her embryo or fetus; or

(c) Of any woman with respect to her embryo or fetus.

(3) Nothing in this chapter is intended to amend or nullify the provisions of chapter 6, title 18, Idaho Code. [I.C., § 18-4016, as added by 2002, ch. 330, § 3, p. 935; am. 2002, ch. 337, § 1, p. 953.]

Compiler's notes. Section 2 of S.L. 2002, ch. 337 is compiled as § 18-907.

CHAPTER 41

INDECENCY AND OBSCENITY

SECTION.

18-4101. Definitions.

18-4102. Affirmative defense.

18-4103. General sale or distribution, etc., of obscene matter — Penalty.

SECTION.

18-4103A. Advertisement, promotion of sale, etc., of matter represented to be obscene — Penalty.

18-4104. Participation in, or production or

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	presentation of, obscene live conduct in public place — Penalty.	18-4108.	Special verdict.
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18-4106.	Distribution to minors — Law governing.	18-4111.	Search warrant for seizure of obscene material.
18-4107.	Conspiracy — Penalty.	18-4112.	Contraband.
		18-4113.	Uniform enforcement — Abrogation of existing ordinances — Further local ordinances banned.
		18-4114.	Enforcement by injunction, etc.
		18-4115.	Partial invalidity — Severability.
		18-4116.	Indecent exposure.

18-4101. Definitions. — The following definitions are applicable to this act:

(A) "Obscene" material means any matter:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

In prosecutions under this act, where circumstances of production, presentation, sale, dissemination, or publicity indicate that the matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that, in the context in which it is used, the matter has no serious literary, artistic, political, or scientific value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience or clearly defined deviant sexual group, the appeal of the subject matter shall be judged with reference to such audience or group.

(C) "Matter" or "material" means any book, magazine, newspaper, or other printed or written material; or any picture, drawing, photograph, motion picture, or other pictorial representation; or any statue or other figure; or any recording, transcription, or mechanical, chemical, or electrical reproduction; or any other articles, equipment, machines, or materials.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity; or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration, by any means.

(F) "Knowingly" means having actual or constructive knowledge of the character of the subject matter or live conduct. A person shall be deemed to have constructive knowledge of the character of the subject matter or live conduct if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the matter, and the failure to inspect the contents is either for the purpose of avoiding such disclosure or is due to reckless conduct.

(G) "Reckless conduct" is conduct which consciously disregards a substantial and unjustifiable risk that matter may be obscene. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that an average law-abiding person would observe in the actor's situation under like circumstances.

(H) "Exhibit" means to show or display.

(I) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where:

- (1) the average person, applying contemporary community standards, would find such conduct, when considered as a whole, appeals to the prurient interest; and
- (2) the conduct is patently offensive because it consists of:
 - (a) ultimate sexual acts, normal or perverted, actual or simulated; or
 - (b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any conduct which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value. In prosecutions under this act, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that, in the context in which it is used, the matter has no serious literary, artistic, political or scientific value. [I.C., § 18-4101, as added by 1973, ch. 305, § 2, p. 655; am. 1976, ch. 81, § 1, p. 258.]

Compiler's notes. Former § 18-4101, which comprised I.C., § 18-4101, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1973, ch. 305, § 1.

Another former § 18-4101 which comprised R.S., R.C., & C.L., § 6840; C.S., § 8303; I.C.A., § 17-2101, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

The words "this act" refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A.

Cross ref. Liquor licenses, suspension or revocation, conviction for violation of obscenity law, §§ 23-933A, 23-1037A.

Sec. to sec. ref. This chapter is referred to

in §§ 18-4109, 23-933A and 23-1037A.

This section is referred to in § 67-6533.

ANALYSIS

Jury voir dire.

"Knowingly" applies to prosecution.

Jury Voir Dire.

Because the question of obscenity of expressive materials involves additional complexities affecting jury voir dire and because the record indicated that the trial court did not go through the proper reasoning process when determining whether to grant defense request for additional time to complete jury voir dire,

but instead allowed the decision to be made by the prosecutor, an abuse of discretion occurred when the additional time was denied and conviction for sale of obscene matter was vacated and case remanded for new trial. *State v. Larsen*, 129 Idaho 294, 923 P.2d 1001 (Ct. App. 1996).

“Knowingly” Applies to Prosecution.

The definition of “knowingly” found in subsection (F) of this section applies to a prosecution under § 18-4105. *State v. Paciorek*, 137 Idaho 629, 51 P.3d 443 (Ct. App. 2002).

Collateral References. 50 Am. Jur. 2d, Lewdness, Indecency and Obscenity, § 1 et seq.

67 C.J.S., Obscenity, § 1 et seq.

Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214; 93 A.L.R.3d 297.

Operation of nude-model photographic studio as offense. 48 A.L.R.3d 1313.

Topless or bottomless dancing or similar conduct is offense. 49 A.L.R.3d 1084.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Porno shops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

18-4102. Affirmative defense. — It is not innocent but calculated purveyance which is prohibited. This act shall not apply to any persons who may possess or distribute obscene matter or participate in conduct otherwise proscribed by this act when such possession, distribution, or conduct occurs:

(A) within the scope of employment of law enforcement and judicial activities; or

(B) within the scope of employment of bona fide school, college, university, museum or public library activities or within the scope of employment of such an organization or a retail outlet affiliated with and serving the educational purposes of such an organization; or

(C) within the scope of employment as a moving picture machine operator, assistant operator, usher, or ticket taker in a motion picture theater in connection with a motion picture film or show exhibited in such theater, if such operator or assistant operator has no financial interest in the motion picture theater wherein he is so employed other than his wages received or owed, and such person consents to give testimony regarding such employment in all judicial proceedings brought under this act, when granted immunity by the trial judge; or

(D) under like circumstances of justification where the possession, distribution or conduct possesses serious literary, artistic, political or scientific value.

If this issue is not presented by the prosecution’s evidence, the defendant may raise the same as an affirmative defense by presenting some evidence thereon. Where raised, the prosecution must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue. [I.C., § 18-4102, as added by 1973, ch. 305, § 4, p. 655; am. 1976, ch. 81, § 2, p. 258.]

Compiler’s notes. Former § 18-4102, which comprised I.C., § 18-4102, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1973, ch. 305, § 3.

Another former § 18-4102 which comprised R.S., R.C., & C.L., § 6841; C.S., § 8304;

I.C.A., § 17-2102, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

The words “this act” refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A.

18-4103. General sale or distribution, etc., of obscene matter — Penalty. — Every person in this state who knowingly: brings or causes to be brought into this state for sale or distribution; or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute; or has in his possession with intent to distribute, exhibit, or offer to distribute, any obscene matter is guilty of a misdemeanor. Each sale, distribution, etc., is a separate violation. [I.C., § 18-4103, as added by 1973, ch. 305, § 6, p. 655; am. 1976, ch. 81, § 3, p. 258.]

Compiler's notes. Former § 18-4103, which comprised I.C., § 18-4103, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1973, ch. 305, § 5.

Another former § 18-4103 which comprised S.L. 1970, ch. 22, § 1, p. 49 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Sec. to sec. ref. This section is referred to in §§ 18-1517A, 18-4109 and 18-7803.

Cited in: State v. Larsen, 129 Idaho 294, 923 P.2d 1001 (Ct. App. 1996).

Collateral References. Constitutionality of state statutes banning distribution of sexual devices. 94 A.L.R.5th 497.

18-4103A. Advertisement, promotion of sale, etc., of matter represented to be obscene — Penalty. — Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material for, or who otherwise advertises or promotes the sale, distribution, or exhibition of matter represented or held out by him to be obscene, whether or not such matter exists in fact, or is obscene, is guilty of a misdemeanor. [I.C., § 18-4103A, as added by 1976, ch. 81, § 4, p. 258.]

Sec. to sec. ref. This section is referred to in § 18-7803.

Collateral References. Constitutionality

of state statutes banning distribution of sexual devices. 94 A.L.R.5th 497.

18-4104. Participation in, or production or presentation of, obscene live conduct in public place — Penalty. — (A) Every person who knowingly engages or participates in, manages, produces, sponsors, presents, or exhibits obscene live conduct to or before an assembly or audience consisting of at least one (1) person or spectator in any public place, or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor.

(B) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production, or other mechanical reproduction containing such conduct, is guilty of a misdemeanor. [I.C., § 18-4104, as added by 1973, ch. 305, § 7, p. 655; am. 1976, ch. 81, § 5, p. 258.]

Sec. to sec. ref. This section is referred to in §§ 18-4109 and 18-7803.

Collateral References. What constitutes "public place" within meaning of state statute

or local ordinance prohibiting indecency or commission of sexual act in public place. 95 A.L.R.5th 229.

18-4105. Public display of offensive sexual material — Penalty. —

Any person who knowingly exhibits or displays or permits to be exhibited or displayed any of the following in such a manner that such exhibit or display is easily visible from any street, sidewalk, thoroughfare, or other public area; or is visible from any transportation facility; or is visible from any residence when the person knows that the owner or occupant of such residence objects to such exhibit or display:

(a) Human genitals or pubic area without a full opaque covering, or any graphic or pictorial depiction thereof, or any depiction of covered male genitals in a discernibly erect state;

(b) An actual or simulated sex act, or sexual contact between humans and animals, or masturbation, or any graphic or pictorial display thereof; or

(c) Any depiction of sado-masochistic abuse, as defined in section 18-1514(5), Idaho Code, is guilty of a misdemeanor. [I.C., § 18-4105, as added by 1973, ch. 305, § 8, p. 655.]

Sec. to sec. ref. This section is referred to in §§ 18-4109 and 18-7803.

Cited in: State v. Paciorek, 137 Idaho 629, 51 P.3d 443 (Ct. App. 2002).

Intent Required.

The definition of “knowingly” found in § 18-4101(F) applies to a prosecution under this section. State v. Paciorek, 137 Idaho 629, 51 P.3d 443 (Ct. App. 2002).

18-4105A. Requiring purchaser or consignee to receive obscene matter as condition to sale, etc. — Penalty. —

Every person, who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is guilty of a misdemeanor. [I.C., § 18-4105A, as added by 1976, ch. 81, § 6, p. 258.]

Compiler’s notes. Section 7 of S.L. 1976, ch. 81 is compiled herein as § 18-4107.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4106. Distribution to minors — Law governing. —

Notwithstanding any of the provisions of this act, the distribution of obscene matter to minors shall be governed by sections 18-1513 to 18-1521, Idaho Code. [I.C., § 18-4106, as added by 1973, ch. 305, § 9, p. 655.]

Compiler’s notes. The words “this act” refer to S.L. 1973, ch. 305 compiled as §§ 18-

1517A, 18-4101 — 18-4115, 23-933A, 23-1037A.

18-4107. Conspiracy — Penalty. —

A conspiracy of two (2) or more persons to commit any of the crimes proscribed by this act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy. [I.C., § 18-4107, as added by 1973, ch. 305, § 10, p. 655; am. 1976, ch. 81, § 7, p. 258.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A.

Sections 6 and 8 of S.L. 1976, ch. 81 are compiled herein as §§ 18-4105A and 18-4109.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4108. Special verdict. — The jury, or the court if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the _____ (title or description of matter or live conduct) to be obscene," or "We find the _____ (title or description of matter or live conduct) not to be obscene." A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding. [I.C., § 18-4108, as added by 1973, ch. 305, § 11, p. 655.]

18-4109. Punishment for violations. — The following punishments are applicable to this act:

Every person who violates sections 18-4103, 18-4104 or 18-4105, Idaho Code, is punishable by a fine of not more than three hundred dollars (\$300), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment for each separate violation. If such person has twice been convicted within the immediately preceding two (2) years for any offense contained in chapter 41, title 18, Idaho Code, and these convictions were for offenses which occurred ten (10) or more days apart, a third or subsequent violation of sections 18-4103, 18-4104 or 18-4105, Idaho Code, within this two (2) year period is punishable as a felony. [I.C., § 18-4109, as added by 1973, ch. 305, § 12, p. 655; am. 1976, ch. 81, § 8, p. 258.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A.

Section 7 of S.L. 1976, ch. 81 is compiled herein as § 18-4107.

18-4110. Expert witness testimony. — In any prosecution for a violation of the provisions of this act, neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter which is the subject of any such prosecution. [I.C., § 18-4110, as added by 1973, ch. 305, § 13, p. 655; am. 1976, ch. 81, § 9, p. 258.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A.

As enacted the section heading of this section read: "Expert witness testimony — Admissibility of evidence."

18-4111. Search warrant for seizure of obscene material. — (A) An affidavit for a search warrant shall be filed with the magistrate describing the matter sought to be seized in detail. Where practical, the matter alleged to be obscene shall be attached to the affidavit for search warrant so as to afford the magistrate the opportunity to examine such material.

(B) Upon the filing of an affidavit for a search warrant, the magistrate shall determine, by examination of the matter sought to be seized, if attached, by an examination of the affidavit describing the matter, or by such other manner or means that he deems necessary, if probable cause exists to believe that the matter is obscene and that probable cause exists for the immediate issuance of a search warrant. Upon making such determination, he shall issue a search warrant ordering the seizure of the matter described in the affidavit for a search warrant according to the provisions of Idaho criminal rules of procedure.

(C) In the event that a search warrant is issued and matter alleged to be obscene is seized under the provisions of this section, any person alleged to be in possession of the said matter or claiming ownership of the matter at the time of its possession or seizure may file a notice in writing with the magistrate within ten (10) days of the date of the seizure alleging that the matter is not obscene and the magistrate shall set a hearing within one (1) day after request therefore, or at such time as the requesting party might agree, and at such hearing evidence may be presented as to the obscenity or nonobscenity of the matter seized and at the conclusion of such hearing, the magistrate shall make a further determination of whether probable cause exists to believe that the matter is obscene or nonobscene. A decision as to whether there is probable cause to believe the seized material to be obscene shall be rendered by the court within two (2) days of the conclusion of said hearing. If at such hearing the magistrate finds that no probable cause exists to believe that the matter is obscene, then the matter shall be returned to the person or persons from whom it was seized.

(D) If a motion to suppress the evidence is granted on the grounds of an unlawful seizure, the property shall be restored unless it is subject to confiscation as contraband, as provided for in section 18-4112, Idaho Code, in which case it shall not be returned.

(E) When a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers.

(F) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative of all other lawful means of obtaining evidence as provided by the laws of this state. Nothing contained in this section shall prevent the obtaining of alleged obscene matter by purchase or under injunction proceedings as authorized by this act or by any other statute of the state of Idaho. [I.C., § 18-4111, as added by 1976, ch. 81, § 11, p. 258.]

Compiler's notes. Former § 18-4111, which comprised I.C., § 18-4111, as added by 1973, ch. 305, § 14, p. 655, was repealed by S.L. 1976, ch. 81, § 10.

The words "this act" refer to S.L. 1976, ch. 81, compiled herein as §§ 18-1514, 18-4101 — 18-4104, 18-4105A, 18-4107, 18-4109 — 18-4112, 18-4114.

18-4112. Contraband. — Destruction of obscene matter or advertisement of matter represented to be obscene:

(A) Obscene matter and advertisements for matter represented to be obscene are contraband and shall be destroyed.

(B) Upon the conviction of the accused or rendition of a court order declaring such matter to be contraband and subject to confiscation, the court shall, when such judgments become final, and all appeal procedures have terminated, order, upon five (5) days' notice to the defendant, any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the prosecuting attorney or any law enforcement agency, to be destroyed, and the court shall cause to be destroyed any such material in its possession or under its control, retaining only such copies as are necessary for law enforcement purposes. [I.C., § 18-4112, as added by 1976, ch. 81, § 13, p. 258.]

Compiler's notes. A former § 18-4112, 1973, ch. 305, § 15, p. 655, was repealed by which comprised I.C., § 18-4112, as added by S.L. 1976, ch. 81, § 12.

18-4113. Uniform enforcement — Abrogation of existing ordinances — Further local ordinances banned. — In order to make the application and enforcement of this act uniform throughout the state, it is the intent of the legislature to preempt, to the exclusion of city and county governments, the regulation of the sale, loan, distribution, dissemination, presentation, or exhibition of material or live conduct which is obscene. To that end, it is hereby declared that every city or county ordinance adopted before the effective date of this act which deals with the sale, loan, distribution, dissemination, presentation, or exhibition of material or live conduct which is obscene shall stand abrogated and unenforceable on or after such effective date; and that no city or county government shall have the power to adopt any ordinance relating to the regulation of the sale, loan, distribution, dissemination, presentation, or exhibition of material or live conduct which is obscene on or after such effective date. [I.C., § 18-4113, as added by 1973, ch. 305, § 16, p. 655.]

Compiler's notes. The words "this act" 1517A, 18-4101 — 18-4115, 23-933A, refer to S.L. 1973, ch. 305 compiled as §§ 18- 23-1037A.

18-4114. Enforcement by injunction, etc. — The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction, upon application by any county prosecutor or city attorney within their respective jurisdictions, or the attorney general, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this act. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this act, in addition to those powers provided under title 52 of the [the] Idaho Code. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one (1) day after filing of an answer to the complaint and a decision shall be rendered by the court within two (2) days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surren-

der to the sheriff of the county in which the action was brought any obscene matter in his possession which is subject to such injunction and such sheriff shall be directed to seize and destroy such matter. [I.C., § 18-4114, as added by 1973, ch. 305, § 17, p. 655; am. 1976, ch. 81, § 14, p. 258.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A. Section 18 of S.L. 1973, ch. 305 is compiled herein as § 18-1517A. Sections 13 and 15 of S.L. 1976, ch. 81 are compiled herein as §§ 18-4112 and 18-1514. The bracketed word "the" was inserted by the compiler.

18-4115. Partial invalidity — Severability. — If any phrase, clause, sentence, section, or provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other phrase, clause, sentence, section, provision, or application of this act which can be given effect without the invalid phrase, clause, sentence, section, provision, or application and to this end the provisions of this act are declared to be severable. [I.C., § 18-4115, as added by 1973, ch. 305, § 21, p. 655.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 305 compiled as §§ 18-1517A, 18-4101 — 18-4115, 23-933A, 23-1037A. Section 22 of S.L. 1973, ch. 305 provided that the act should be in full force and effect on and after July 1, 1973. Section 20 of S.L. 1973, ch. 305 is compiled as § 23-1037A.

18-4116. Indecent exposure. — Every person who willfully and lewdly, either:

- (1) Exposes his or her genitals, in any public place, or in any place where there is present another person or persons who are offended or annoyed thereby; or,
- (2) Procures, counsels, or assists any person so to expose his or her genitals, where there is present another person or persons who are offended or annoyed thereby is guilty of a misdemeanor.

Any person who pleads guilty to or is found guilty of a violation of subsection (1) or (2) of this section or a similar statute in another state or any local jurisdiction for a second time within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), is guilty of a felony. [I.C., § 18-4116, as added by 1996, ch. 241, § 1, p. 771.]

Sec. to sec. ref. This section is referred to in §§ 18-310 and 18-8304.

CHAPTER 42

INTOXICANTS AND INTOXICATION

SECTION.
18-4201. [Repealed.]
18-4202. Acting as physician while intoxicated.

18-4201. Selling liquor to Indians. [Repealed.]

Compiler's notes. This section, which § 6929; C.S., § 8355; I.C.A., § 17-2724, was comprised S.L. 1879, p. 31; R.S., R.C., & C.L., repealed by S.L. 1955, ch. 262, § 1, p. 630.

18-4202. Acting as physician while intoxicated. — Every physician who, in a state of intoxication, does any act as such physician to another person by which the life of such other person is endangered, is guilty of a misdemeanor. [I.C., § 18-4202, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6860; C.S., § 8325; I.C.A., § 17-2001, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

CHAPTER 43

IRRIGATION WORKS

SECTION.

- 18-4301. Interference with ditches, canals, laterals, drains or reservoirs.
- 18-4302. Wasting water used for irrigation.
- 18-4303. Obstruction of overflow, gauge or waterway in dam.
- 18-4304. Wrongful diversion of water.
- 18-4305. Interference with headgate — Cutting banks of stream.
- 18-4306. Injuries to ditches, canals, laterals, drains and appurtenances.

SECTION.

- 18-4307. Injury to measuring devices.
- 18-4308. Change of ditch, canal, lateral, drain or buried irrigation conduit.
- 18-4309. Unauthorized tampering with measuring devices.
- 18-4310. Neglect to deliver water — Interference with delivery.

18-4301. Interference with ditches, canals, laterals, drains or reservoirs. — Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, lateral, drain, flume or reservoir, used for the purpose of holding, draining or conveying water for manufacturing, agricultural, mining, or domestic uses, or who shall, without like authority, raise, lower, or otherwise disturb, any gate or other appurtenance thereof used for the control or measurement of water, or who shall empty or place, or cause to be emptied or placed, into any such canal, ditch, lateral, drain, flume, or reservoir, any rubbish, filth, or obstruction to the free flow of water, is guilty of a misdemeanor. [I.C., § 18-4301, as added by 1972, ch. 336, § 1, p. 844; am. 2002, ch. 115, § 1, p. 326.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7137; C.S., § 8528; am. 1921, ch. 131, § 1, p. 314; am. 1929, ch. 89, § 1, p. 143; I.C.A., § 17-4116, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 2002, ch. 115 is compiled as § 18-4306.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Malicious injury to water conduit is a felony, § 18-7019.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. 13 Am. Jur. 2d, Canals, § 1 et seq.

45 Am. Jur. 2d, Irrigation, § 1 et seq.

78 Am. Jur. 2d, Waters, § 1 et seq.
12A C.J.S., Canals, § 1 et seq.

93, 94 C.J.S. Waters, § 1 et seq.

18-4302. Wasting water used for irrigation. — Any person or persons, who shall wilfully or wantonly waste any of the waters of any stream, the waters of which are used for irrigation, to the detriment of any claimant of such water for irrigation purposes, by diverting the same for an unnecessary use or purpose, or by allowing such water to waste by running into depressions or dry channels so that the same cannot be used for irrigation, nor reach the original channel of the stream from which it has been diverted, are guilty of a misdemeanor. [I.C., § 18-4302, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1899, p. 336, § 1; reen. R.C. & C.L., § 7144; C.S., § 8529; am. 1921, ch. 131, § 2, p. 314; am. 1929, ch. 89, § 2, p. 143; I.C.A., § 17-4117, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: *Walbridge v. Robinson*, 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240 (1912).

ANALYSIS

Appropriator permitting use by others.
In general.
Public policy.
Questions for jury.

Appropriator Permitting Use by Others.

It is the duty of the prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for the use thereof. To allow a junior, or other, appropriator to establish an adverse right to such water during times when it is not required and not being used, by the original appropriator, on the theory that such adverse use was inconsistent with the right of the prior appropriator, would subvert the purpose of the law and encourage wasteful diversion and use of water in violation thereof. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957).

In General.

Waters of all streams belong to the public, and while right to use thereof for beneficial purposes may be acquired and maintained, yet the public is interested in the water and in its beneficial use, and it is against the spirit and policy of the constitution and laws, as well as contrary to public policy, to permit wasting of the waters. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900).

Where it is necessary to divert and apply

more water than soil will absorb, as on sloping land, excess is not waste within the meaning of this and § 42-916. *Beasley v. Engstrom*, 31 Idaho 14, 168 P. 1145 (1917).

Waters of state belong to state and right to beneficial use thereof is all that can be acquired. *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 227 P. 29 (1924).

Public Policy.

This section is declaratory of a well defined public policy that existed before the enactment of this statute. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900).

It is against public policy of state, as well as against express enactments, for water user to take from irrigation canal more water than is necessary for his land. *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 227 P. 29 (1924).

The policy of the law of this state is to secure the maximum use and benefit of its water resources. To effectuate this policy, the legislature has made it a misdemeanor to waste water from a stream, the waters of which are used for irrigation. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957); *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Where springs which arose in area of defendant's land were tributary to a water course, waste water in that area constituted a by-product of the irrigation waters arising in the area and reclaiming such water whether waste or otherwise, by drainage into natural channel of a stream, if without detriment or damage to others was in keeping with the expressed policy of the state to secure maximum beneficial and least wasteful use of its water resources. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Questions for Jury.

What constitutes waste depends upon the circumstances of each case and is a question of fact for the jury. *Beasley v. Engstrom*, 31 Idaho 14, 168 P. 1145 (1917).

18-4303. Obstruction of overflow, gauge or waterway in dam. —

Any person or persons who shall obstruct any overflow, gauge or waterway, placed in any dam by order of any water master, so as to impede the flow of water over such dam as regulated by the water master, shall be guilty of a misdemeanor. [I.C., § 18-4303, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1899, p. 336, § 2; reen. R.C. & C.L., § 7144a; C.S., § 8530; am. 1921, ch. 131, § 3, p. 314; am. 1929, ch. 89, § 3, p. 143; I.C.A., § 17-4118, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: Walbridge v. Robinson, 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240 (1912).

18-4304. Wrongful diversion of water. — Any person who without the consent of the water master of the district, diverts any water from a ditch or channel where it has been placed, or caused or left to run by the water master or his deputies, or who shuts or opens any ditch, gate or dam, or in any way impedes or increases the flow of water in any stream or ditch diverting water from a stream, while the same is under the charge of a water master, or who cuts away any embankment of a stream, whereby the water of such stream is diverted, or breaks, injures, or removes any gate, flume or other device used for the equitable distribution of the water of such stream by the water master, shall be guilty of a misdemeanor. [I.C., § 18-4304, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1899, p. 336, § 3; reen. R.C. & C.L., § 7144b; C.S., § 8531; am. 1921, ch. 131, § 4, p. 314; am. 1929, ch. 89, § 4, p. 143; I.C.A., § 17-4119, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-4305. Interference with headgate — Cutting banks of stream. —

If any obstruction shall be wilfully and maliciously placed on any overflow gauge in any stream of water which is used for irrigation and is under control of a water master, and such obstruction retards or impedes the free overflow of the water of such stream, thereby increasing the pressure against a headgate through which water is diverted by means of such dam, or if any headgate regulated by a water master shall be removed, broken, injured or interfered with so as to disturb the distribution of the water as regulated by the water master, or if any bank of the natural stream, the water of which is being used for irrigation and is being distributed by a water master, shall be cut away so as to increase the flow of water from such stream, thereby interfering with the distribution of the water as regulated by a water master, the person or persons so interrupting the flow of said water as aforesaid, shall be guilty of a misdemeanor. [I.C., § 18-4305, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1899, p. 336, § 4; reen. R.C. & C.L., § 7144c; C.S., § 8532; am. 1921, ch.

131, § 5, p. 314; am. 1929, ch. 89, § 5, p. 143; I.C.A., § 17-4120, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sufficiency of Information.

Information charging interference with

headgate regulated by water master, sufficiently comprehensive and explicit to enable person of common understanding to know what is intended, satisfies requirements of this section. *State v. George*, 44 Idaho 173, 258 P. 551, cert. denied, 275 U.S. 544, 48 S. Ct. 83, 72 L. Ed. 417 (1927).

18-4306. Injuries to ditches, canals, laterals, drains and appurtenances. — Any person or persons, who shall willfully cut, break, damage, or in any way interfere with any ditch, canal, lateral, drain, headgate, or any other works in or appurtenant thereto, the property of another person, irrigation district, drainage district, canal company, corporation, or association of persons, and whereby water is conducted to any place for beneficial use or purposes, and when said canal, headgate, ditch, lateral, drain, dam, or appurtenance is being used or is to be used for said conduct or drainage of water, shall be guilty of a misdemeanor. [I.C., § 18-4306, as added by 1972, ch. 336, § 1, p. 844; am. 2002, ch. 115, § 2, p. 326.]

Compiler's notes. A former section, which comprised 1907, p. 237, § 1; reen. R.C. & C.L., § 7145; C.S., § 8533; am. 1921, ch. 131, § 6, p. 314; am. 1929, ch. 89, § 6, p. 143; I.C.A., § 17-4121, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sections 1 and 3 of S.L. 2002, ch. 115 are compiled as §§ 18-4301 and 18-4308, respectively.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: *State v. Suiter*, 138 Idaho 662, 67 P.3d 1274 (Ct. App. 2003).

Application.

Breaking padlock which fastened headgate and interfering with headgate was violation of this section. *Nettleton v. Cook*, 30 Idaho 82, 163 P. 300 (1917).

18-4307. Injury to measuring devices. — Any person or persons who shall cut, break, injure, destroy, enlarge, change, or alter any headgate, sluiceway, weir, water box, or other measuring device, the property of any irrigation district, corporation or association of persons, or in the possession of, or in the use of, said irrigation district, corporation, or association, or the property of another, shall be guilty of a misdemeanor.

Any person or persons who shall change, alter, destroy, disturb, enlarge, or interfere with any headgate, dam, weir, water box, or other measuring device, made, placed, used or regulated by any duly appointed, elected, or authorized water master, deputy water master, ditch walker, ditch rider, engineer, or other authorized agent of any irrigation company, corporation or association or person, when said measuring device is being used or is to be used for the measurement of water, shall be guilty of a misdemeanor. [I.C., § 18-4307, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1907, p. 237, §§ 2, 3; reen. R.C. & C.L., § 7146; C.S., § 8534; am. 1921, ch. 131, § 7, p. 314; am. 1929, ch. 89, § 7, p. 143; I.C.A., § 17-4122, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: *Nettleton v. Cook*, 30 Idaho 82, 163 P. 300 (1917).

18-4308. Change of ditch, canal, lateral, drain or buried irrigation conduit. — Where any ditch, canal, lateral or drain has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling the said land, shall have the right at his own expense to change said ditch, canal, lateral, drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral, drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A landowner shall also have the right to bury the ditch, canal, lateral or drain of another in pipe on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner.

The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner.

While the owner of a ditch, canal, lateral, drain or buried irrigation conduit shall have no right to relocate it on the property of another without permission, a ditch, canal, lateral or drain owner shall have the right to place it in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but not to exceed five (5) days after the start of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, canal, lateral or drain, provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the conduit owner.

No more than five (5) days after the start of construction, a landowner or ditch owner who buries a ditch, canal, lateral or drain in pipe shall record the location and specifications of the buried irrigation or drainage conduit, including primary and secondary easements, in the county in which the burying is done, and shall provide the irrigation or drainage entity that owns the ditch, canal, lateral, or drain, with a copy of such location and specifications and the construction plans utilized. The irrigation or drainage

entity shall keep and maintain such records and have them available for the public.

Any person or persons who relocate or bury a ditch, canal, lateral or drain contrary to the provisions of this section shall be guilty of a misdemeanor. [I.C., § 18-4308, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 151, § 2, p. 345; am. 2000, ch. 355, § 1, p. 1190; am. 2002, ch. 115, § 3, p. 326.]

Compiler's notes. A former section, which comprised 1907, p. 237, § 4; reen. R.C. & C.L., § 7147; C.S., § 8535; I.C.A., § 18-4123, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 1 of S.L. 1994, ch. 151 is compiled as § 42-1207.

Sections 2 and 4 of S.L. 2002, ch. 115 are compiled as §§ 18-4306 and 42-1207, respectively.

ANALYSIS

Burden of proof.

Impediment in flow.

In general.

Right to change location.

Burden of Proof.

Where servient estate cut off ditch used by defendant for part of his water supply, but constructed a new ditch for use of defendant, burden of proof in proceeding to enjoin prosecution for cutting off ditch was on plaintiff to show that new ditch would convey same

amount of water as conveyed by old ditch without impeding the flow. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

Impediment in Flow.

If change in location of ditch requires rotation in use of water by users of ditch, there is a substantial impediment in flow of water. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

In General.

Irrigation company can change place of diversion in canal if water user is not injured, even though he has established point of diversion which he is entitled to use. *Harsin v. Pioneer Irrigation Dist.*, 45 Idaho 369, 263 P. 988 (1927).

Right to Change Location.

Servient estate seeking to change location of ditch must comply with statutory requirement, since prior to enactment of statutory law there was no right to change a ditch. *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951).

18-4309. Unauthorized tampering with measuring devices. — Every person who shall wilfully waste water for irrigation, or who shall wilfully open, close, change or disturb, or interfere with, any headgate or water box or valve or measuring or regulating device, without authority, shall be guilty of a misdemeanor. The water masters or their assistants, within their district, shall have power to arrest any person or persons offending, and turn them over to the sheriff or the nearest peace officer of the county in which such offense is committed, and immediately upon delivering such person so arrested into the custody of either of such officers, it shall be the duty of the water master making such arrest to make complaint, in writing and under oath, before the proper justice of the peace, or the probate judge of such county, against the person so arrested. [I.C., § 18-4309, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1899, p. 380, § 18; am. R.C. & C.L., § 7149; C.S., § 8538; am. 1921, ch. 131, § 9, p. 314; am. 1929, ch. 89, § 9, p. 143; I.C.A., § 17-4124; am. 1949, ch. 172, § 1, p. 370, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sufficiency of Complaint.

A complaint which charges defendant did wilfully waste irrigation water by "interfering with and disturbing a certain water-regulating device * * * in violation of former section 18-4309, Idaho Code" charges him with wast-

ing water for irrigation and not with wilfully interfering with a water regulating device and is insufficient to support conviction of

latter offense. *State v. Hall*, 90 Idaho 478, 413 P.2d 685 (1966).

18-4310. Neglect to deliver water — Interference with delivery. — Any superintendent or any person having control or charge of the said ditch, canal or conduit, who shall wilfully neglect or refuse to deliver water as provided in chapter 9, of title 42, or person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having a right thereto, shall be guilty of a misdemeanor; and the owner or owners of such ditch, canal or conduit shall be liable in damages to the person or persons deprived of the use of water to which they were entitled as provided in said chapter 9. [I.C., § 18-4310, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1899, p. 380, § 18; am. R.C. & C.L., § 7149; C.S., § 8538; am. 1921, ch. 131, § 9, p. 314; am. 1929, ch. 89, § 9, p. 143; I.C.A., § 17-4125, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when

not otherwise provided, § 18-113.

Sufficiency of Complaint.

A complaint which alleges that the defendant interfered with the proper delivery of irrigation water to a named person without alleging that such person had a right to such water is insufficient to charge a violation of the former section. *State v. Hall*, 90 Idaho 478, 413 P.2d 685 (1966).

CHAPTER 44

JURIES AND JURORS

SECTION.

18-4401. Grand juror acting after challenge against him.

18-4402. Disclosing indictment before arrest of defendant.

SECTION.

18-4403. Disclosing proceedings before grand jury.

18-4404. Tampering with jury list.

18-4405. Certifying to false jury lists.

18-4401. Grand juror acting after challenge against him. — Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part, or attempts to take part, in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor. [I.C., § 18-4401, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6527; C.S., § 8195; I.C.A., § 17-1018, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Bribery of judicial officers, § 18-1301 et seq.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. 47 Am. Jur. 2d, Jury, § 1 et seq.

50 C.J.S., Juries, § 1 et seq.

Accused's right to inspection of minutes of state grand jury. 20 A.L.R.3d 7.

18-4402. Disclosing indictment before arrest of defendant. — Every grand juror, prosecuting attorney, clerk, judge or other officer who,

except by issuing or in executing a warrant of arrest, wilfully discloses the fact of a presentment or indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor. [I.C., § 18-4402, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 218; R.S., R.C., & C.L., § 6531; C.S., § 8199; I.C.A., § 17-1022, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-4403. Disclosing proceedings before grand jury. — Every grand juror who, except when required by a court, wilfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury may have said, or in what manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor. [I.C., § 18-4403, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6532; C.S., § 8200; I.C.A., § 17-1023, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: State v. Dutt, — Idaho —, 73 P.3d 112 (Ct. App. 2003).

18-4404. Tampering with jury list. — Every person who adds any names to the list of persons selected to serve as jurors, either by placing the same in the jury box or otherwise, or extracts any name therefrom, or destroys the jury box or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same cannot be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony. [I.C., § 18-4404, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6467; C.S., § 8158; I.C.A., § 17-904, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-4405. Certifying to false jury lists. — Every officer or person required by law to certify to the list of persons selected as jurors, who maliciously, corruptly or wilfully certifies to a false or incorrect list, or a list containing other names than those selected, or who, being required by law to write down the names placed on the certified lists on separate pieces of paper, does not write down and place in the jury box the same names that are on the certified list, and no more and no less than are on such list, is guilty of a felony. [I.C., § 18-4405, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6468; C.S., § 8159; I.C.A., § 17-905, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

CHAPTER 45

KIDNAPING

SECTION.

- 18-4501. Kidnaping defined.
 18-4502. First degree kidnapping — Ransom.
 18-4503. Second degree kidnapping when not for ransom.
 18-4504. Punishment — Liberation of kidnapped person.
 18-4504A. Notice of intent to seek death penalty.
 18-4505. Inquiry into mitigating or aggravating circumstances — Sentence in kidnapping cases — Statutory aggravating circumstances — Judicial findings.

SECTION.

- 18-4506. Child custody interference defined — Defenses — Punishment.
 18-4507. Short title.
 18-4508. Definitions.
 18-4509. Missing child reports — Law enforcement agencies — Duties.
 18-4510. Birth records of missing children — State registrar's duties.
 18-4511. School duties — Records of missing child — Identification upon enrollment — Transfer of student records.
 18-4512. Missing persons clearinghouse.

18-4501. Kidnaping defined. — Every person who wilfully:

1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of this state, or in any way held to service or kept or detained against his will; or,

2. Leads, takes, entices away or detains a child under the age of sixteen (16) years, with intent to keep or conceal it from its custodial parent, guardian or other person having lawful care or control thereof, or with intent to steal any article upon the person of the child; or,

3. Abducts, entices or by force or fraud unlawfully takes or carries away another at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state; or,

4. Seizes, confines, inveigles, leads, takes, entices away or kidnaps another against his will to extort money, property or any other thing of value or obtain money, property or reward or any other thing of value for the return or disposition of such person is guilty of kidnapping. [I.C., § 18-4501, as added by 1972, ch. 336, § 1, p. 844; am. 1985, ch. 121, § 1, p. 296.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 51; R.S., R.C., & C.L., § 6584; am. 1919, ch. 166, § 1, p. 534; C.S., § 8224; I.C.A., § 17-1303; am. 1937, ch. 17, § 1, p. 27, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Section 2 of S.L. 1985, ch. 121 declared an emergency. Approved March 20, 1985.

Cross ref. Enticing for prostitution or other immoral purpose, white slave traffic, § 18-5601 et seq.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-7803, 18-7905, 19-2520, 19-2520C, 19-5506 and 20-525A.

Cited in: State v. Jackson, 96 Idaho 584, 532 P.2d 926 (1975); State v. Cochran, 97 Idaho 71, 539 P.2d 999 (1975); State v. Fink, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985); Almada v. State, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985); Lopez v. State, 108 Idaho 394, 700 P.2d 16 (1985); State v. Major, 111 Idaho 410, 725 P.2d 115 (1986); State v. Chapman, 112 Idaho 1011, 739 P.2d 310 (1987); State v. Hoffman, 116 Idaho 480, 776 P.2d 1199 (Ct. App. 1989); State v. Korsen, — Idaho —, — P.3d —, 2004 Ida. App. LEXIS 8 (Ct. App. Jan. 21, 2004).

ANALYSIS

Consent of minor.
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Consent of Minor.

Consent of minor is no defense to prosecution, if parents or guardians do not consent. *State v. Suennen*, 36 Idaho 219, 209 P. 1072 (1922).

Construction.

Subdivision 2. of this section makes no distinction between temporary or permanent "lawful care or control thereof"; thus, where the mother had the custodial right, the mere fact that the custodial right was temporary does not bar the charge of kidnapping against anyone, including the other parent. *State v. Chapman*, 108 Idaho 841, 702 P.2d 879 (Ct. App. 1985), *aff'd*, 112 Idaho 1011, 739 P.2d 310 (1987).

Double Jeopardy.

Defendant's simultaneous convictions of robbery and kidnapping violated neither the double jeopardy clause of the United States Constitution nor the Idaho multiple punishment statute. *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980).

The elements of enticement and concealment which afford the basis of a kidnapping conviction are different from the requisite elements of assault with intent to commit rape; one crime could have occurred without committing the other and there is no violation of § 18-301 (repealed) when a defendant is convicted of both offenses. *State v. Greensweig*, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

Elements.

Statutory crime of kidnapping contains all of the elements of false imprisonment. *State v. Evans*, 72 Idaho 458, 243 P.2d 975 (1952).

Evidence.

Evidence that victim was grabbed by one man and forced to enter a truck a half a block away with the aid of two other men and then driven to a remote area was sufficient to sustain a conviction for kidnapping, so that the

trial court erred in dismissing the charges at the close of the prosecution's presentation of evidence. *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975).

In a prosecution for second degree kidnapping, where defense counsel attempted to cross-examine the complaining witness as to whether she had an opportunity to drive away while defendant was out of the car and thus escape the kidnapping, the trial judge's remark, in ruling on a prosecution objection to the question, that in his opinion there was no evidence that she had an opportunity to drive away was a prejudicial comment on an issue which was critical to the guilt or innocence of defendant. *State v. White*, 97 Idaho 708, 551 P.2d 1344, *cert. denied*, 429 U.S. 842, 97 S. Ct. 118, 50 L. Ed. 2d 111 (1976). For further proceedings see *State v. White*, 98 Idaho 781, 572 P.2d 884 (1977).

In a prosecution for robbery and kidnapping the jury was at liberty to believe the victim's version of the story or to reject it as unreliable, and by convicting the defendant of the crimes charged, the jury chose to accept the victim's version; and where the victim furnished competent and sufficient evidence to support such a finding which was corroborated by the testimony of the witness and the arresting police officers, the record contained sufficient evidence to constitute a *prima facie* case and the court did not err in refusing to dismiss the case. *State v. Cotton*, 100 Idaho 573, 602 P.2d 71 (1979).

The evidence was sufficient to support defendant's convictions for rape and first degree kidnapping. *State v. Whiteley*, 124 Idaho 261, 858 P.2d 800 (Ct. App. 1993).

—Intent.

Where the element of intent to keep or conceal the child was committed within Idaho, the defendant may be charged with kidnapping in Idaho, even though the actual concealment occurred outside the state; thus, the defendant could be charged with kidnapping where after he lost on the temporary custody hearing, he began making plans and preparations in Idaho to steal away the child, wound up his business affairs, obtained passports for himself and the child, stored away his property, and vacated his residence secretly without notice. *State v. Chapman*, 108 Idaho 841, 702 P.2d 879 (Ct. App. 1985), *aff'd*, 112 Idaho 1011, 739 P.2d 310 (1987).

Where prosecutrix, age thirteen, met defendant, age thirty-one, at a movie, accompanied him to his home and later traveled with him to Montana, the evidence was sufficient to allow the jury to find the intent to keep or conceal prosecutrix from her parents and to sustain defendant's conviction for kidnapping in the second degree. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other

grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Because intent is an element of the crime of kidnapping in the second degree, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the intent with which the accused committed the act. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

While a defendant's mental condition has been expressly eliminated as a defense under § 18-207(1), the defendant may still use expert evidence on the issue of the defendant's state of mind where it is an element of the offense and such evidence is subject to the rules of evidence. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Impeachment of Complaining Witness.

In a prosecution for second degree kidnapping where defendant sought to impeach the credibility of the complaining witness' testimony by showing that her motivation for fabricating the kidnapping was to avoid a confrontation with her parents, the trial court was in error in cutting off defense counsel's cross-examination of the complaining witness on the effect of a recent pregnancy and miscarriage on her relationship with her parents. *State v. White*, 97 Idaho 708, 551 P.2d 1344, cert. denied, 429 U.S. 842, 97 S. Ct. 118, 50 L. Ed. 2d 111 (1976). For further proceedings see *State v. White*, 98 Idaho 781, 572 P.2d 884 (1977).

Included Offense.

The aggravated battery was not a lesser included offense of the kidnapping because the aggravated battery, although sequentially related to the kidnapping, was a separate and distinct crime, requiring elements of proof beyond that required for the kidnapping. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

In General.

Where defendant jumped on running board of automobile and forced boy who was driving it to drive him to such place or places as defendant desired, his acts as a matter of law constituted the felony of kidnapping. *State v. Autheman*, 47 Idaho 328, 274 P. 805, 62 A.L.R. 195 (1929).

The court did not err in failing to require the state to specify the subdivision of the former section under which the defendants were charged where the allegations of the information sufficiently demonstrated that the state could not have been relying on former subsections 2, 3, or 4. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

The district court properly instructed the jury on the elements of the offense of kidnapping in the second degree and the instructions

adequately addressed the intent requirement of the offense, accordingly, in consideration of the instructions given and in light of the Idaho Criminal Jury Instructions preface, a separate instruction defining intent was unnecessary. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Inquiry into Victim's Sexual Conduct.

In prosecution for kidnapping and rape of a minor, inquiry into victim's past sexual conduct was impermissible since mere unchastity does not support an inference of consent to being kept or detained within the meaning of the kidnapping statute and since defendant did not offer to prove that the victim had engaged in past conduct manifesting a pattern of voluntary encounters with men under similar circumstances. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

Where defendant, in prosecution for kidnapping and statutory rape, made no offer to prove a connection between victim's prior sexual conduct and a motive or propensity to fabricate, the victim's prior sexual conduct was not relevant to her general credibility as a witness and the district judge properly refused to allow inquiry into the victim's sexual history. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

Mistake as to Age of Minor.

In prosecutions for offenses against minor females and kindred offenses, it is generally held that lack of knowledge of age of girl or even belief that she is over statutory age is no defense to prosecution. *State v. Suennen*, 36 Idaho 219, 209 P. 1072 (1922).

Motive.

One who entices away minor female under this section is guilty even though motive for act was marriage. *State v. Suennen*, 36 Idaho 219, 209 P. 1072 (1922).

Refusal to Give Instruction.

Trial court's refusal to give jury instruction correctly requested by defendant that the offense of false imprisonment is a lesser included offense within the crime of kidnapping was error. *State v. Wilcott*, 103 Idaho 766, 653 P.2d 1178 (1982).

Sentence.

Where defendant convicted of aggravated assault, second degree kidnapping, misdemeanor battery, and use of a firearm in the commission of a crime, had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for reha-

bilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Where defendant picked up a five-year old boy while he was walking to kindergarten and transported him to a remote area in his pickup truck, slapped the boy, took off all of the boy's clothes and touched him by his legs in a place the boy described as "nasty," a life term with a minimum period of confinement of 15 years was not an abuse of discretion. *State v. Estes*, 120 Idaho 953, 821 P.2d 1008 (Ct. App. 1991).

Special Counsel.

Objection to appointment of special counsel in kidnapping case was waived where no objection was made at trial of case. *State v. Evans*, 72 Idaho 458, 243 P.2d 975 (1952).

Sufficiency of Allegations.

Allegation "kept and detained against her will" was held sufficient, since secrecy of de-

tention does not have to be alleged. *State v. Evans*, 72 Idaho 458, 243 P.2d 975 (1952).

Collateral References. 1 Am. Jur. 2d, Abduction and Kidnaping, § 1 et seq.

51 C.J.S., Kidnaping, § 1 et seq.

Presumption of coercion of wife. 4 A.L.R. 279; 71 A.L.R. 1116.

Forcing another to transport one as constituting offense of kidnapping or of abduction. 62 A.L.R. 200.

Belief in legality of the act as affecting offense of abduction or kidnapping. 114 A.L.R. 870.

Fraud or false pretenses, kidnapping by. 95 A.L.R.2d 450.

What is "harm" within provisions of statutes increasing penalty for kidnapping where victim suffers harm. 11 A.L.R.3d 1053.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 A.L.R.5th 283.

Seizure of prison by inmates as kidnapping. 59 A.L.R.3d 1306.

False imprisonment as included offense with charge of kidnapping. 68 A.L.R.3d 828.

Necessity and sufficiency of showing in kidnapping prosecution, that detention was with intent to "secretly" confine victim. 98 A.L.R.3d 733.

Kidnaping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

18-4502. First degree kidnapping — Ransom. — Any kidnapping committed for the purpose of obtaining money, property or any other thing of value for the return or disposition of such person kidnapped, or committed for the purpose of raping, or committing the infamous crime against nature, or committing serious bodily injury upon the person kidnapped, or committing any lewd and lascivious act upon any child under the age of sixteen (16) years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of any person, shall be kidnapping in the first degree. [I.C., § 18-4502, as added by 1972, ch. 336, § 1, p. 844; am. 1978, ch. 254, § 1, p. 555; am. 1981, ch. 321, § 1, p. 670.]

Compiler's notes. A former section, which comprised 1937, ch. 15, § 1, p. 26, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the law as it existed prior to its repeal.

Sec. to sec. ref. This section is referred to in §§ 18-8304, 18-8314, 19-5307, 19-5506 and 33-1208.

Cited in: *State v. Smith*, 122 Idaho 560, 835 P.2d 1371 (Ct. App. 1992).

ANALYSIS

Common scheme or plan.

Evidence.

— Intent.

Included offense.

Refusal to give instruction.

Sentence.

Common Scheme or Plan.

The existence of facts that supported an inference that defendant had a plan to pick up young girls based on the testimony of two girls was irrelevant to any issue in dispute. Therefore, the court exceeded the bounds of its discretion when it chose to apply the legal standard of "common scheme or plan" to facts that were not relevant to any disputed issue. However, other evidence in the case was sufficient for the jury to conclude that defendant had committed first-degree kidnapping and therefore the error of admitting the two girls' testimony was harmless error. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992), *aff'd*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

Evidence.

The evidence was sufficient to support defendant's convictions for rape and first degree kidnapping. *State v. Whiteley*, 124 Idaho 261, 858 P.2d 800 (Ct. App. 1993).

—Intent.

Because intent is an element of the crime of kidnapping in the second degree, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the intent with which the accused committed the act. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

While a defendant's mental condition has been expressly eliminated as a defense under § 18-207(1), the defendant may still use expert evidence on the issue of the defendant's state of mind where it is an element of the offense and such evidence is subject to the rules of evidence. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Defendant's conviction of first degree kidnapping was proper where there was substantial competent evidence upon which the jury could rely in determining that defendant possessed the intent to rape the victim at the time he committed the kidnapping. *State v. Norton*, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000).

Included Offense.

The aggravated battery was not a lesser included offense of the kidnapping because the aggravated battery, although sequentially related to the kidnapping, was a separate and distinct crime, requiring elements of proof beyond that required for the kidnapping. *State v. Campbell*, 114 Idaho 367, 757 P.2d

230 (Ct. App. 1988), *cert. denied*, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Because the use of a pistol was recited in the elements of the aggravated assault and also appeared in the kidnapping enhancement as charged, the aggravated assault charge was an included offense of the kidnapping charge and the separate conviction for aggravated assault must be vacated. *State v. Bryant*, 127 Idaho 24, 896 P.2d 350 (Ct. App. 1995).

Refusal to Give Instruction.

Trial court's refusal to give jury instruction correctly requested by defendant that the offense of false imprisonment is a lesser included offense within the crime of kidnapping was error. *State v. Wilcott*, 103 Idaho 766, 653 P.2d 1178 (1982).

Sentence.

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Where defendant picked up a five-year old boy while he was walking to kindergarten and transported him to a remote area in his pickup truck, slapped the boy, took off all of the boy's clothes and touched him by his legs in a place the boy described as "nasty," a life term with a minimum period of confinement of 15 years was not an abuse of discretion. *State v. Estes*, 120 Idaho 953, 821 P.2d 1008 (Ct. App. 1991).

Based upon the facts and circumstances of the offenses and defendant's character, the District Court did not clearly abuse its discretion in sentencing defendant or in denying his I.C.R., Rule 35 motion where defendant was convicted of first degree burglary, first degree kidnapping, and aggravated battery against his ex-wife. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

Where defendant was an adult male who had forcefully abducted a young girl who was walking to school and molested her and defendant was a prior sex offender, a sentence of a fixed term of eighteen years for first-degree kidnapping was reasonable. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992), *aff'd*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

18-4503. Second degree kidnaping when not for ransom. — Every other kidnaping committed shall be kidnaping in the second degree. [I.C., § 18-4503, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised 1937, ch. 15, § 2, p. 26, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in §§ 18-8304 and 33-1208.

Cited in: *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975); *State v. Fink*, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985); *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986); *State v. Hoffman*, 116 Idaho 480, 776 P.2d 1199 (Ct. App. 1989).

ANALYSIS

Evidence.

—Intent.

Impeachment of complaining witness.

Instructions.

Sentence.

Evidence.

In a prosecution for second degree kidnapping, where defense counsel attempted to cross-examine the complaining witness as to whether she had an opportunity to drive away while defendant was out of the car and thus escape the kidnapping, the trial judge's remark, in ruling on a prosecution objection to the question, that in his opinion there was no evidence that she had an opportunity to drive away was a prejudicial comment on an issue which was critical to the guilt or innocence of defendant. *State v. White*, 97 Idaho 708, 551 P.2d 1344, cert. denied, 429 U.S. 842, 97 S. Ct. 118, 50 L. Ed. 2d, 111 (1976). For further proceedings see *State v. White*, 98 Idaho 781, 572 P.2d 884 (1977).

In a prosecution for robbery and kidnapping the jury was at liberty to believe the victim's version of the story or to reject it as unreliable, and by convicting the defendant of the crimes charged, the jury chose to accept the victim's version; and where the victim furnished competent and sufficient evidence to support such a finding which was corroborated by the testimony of the witness and the arresting police officers, the record contained sufficient evidence to constitute a prima facie case and the court did not err in refusing to dismiss the case. *State v. Cotton*, 100 Idaho 573, 602 P.2d 71 (1979).

—Intent.

Where prosecutrix, age 13, met defendant, age 31, at a movie, accompanied him to his home and later traveled with him to Montana, the evidence was sufficient to allow the jury to find the intent to keep or conceal prosecutrix from her parents and to sustain defendant's conviction for kidnapping in the second degree. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other

grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Because intent is an element of the crime of kidnapping in the second degree, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the intent with which the accused committed the act. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

While a defendant's mental condition has been expressly eliminated as a defense under § 18-207(1), the defendant may still use expert evidence on the issue of the defendant's state of mind where it is an element of the offense and such evidence is subject to the rules of evidence. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Impeachment of Complaining Witness.

In a prosecution for second degree kidnapping where defendant sought to impeach the credibility of the complaining witness' testimony by showing that her motivation for fabricating the kidnapping was to avoid a confrontation with her parents, the trial court was in error in cutting off defense counsel's cross-examination of the complaining witness on the effect of a recent pregnancy and miscarriage on her relationship with her parents. *State v. White*, 97 Idaho 708, 551 P.2d 1344, cert. denied, 429 U.S. 842, 97 S. Ct. 118, 50 L. Ed. 2d 111 (1976). For further proceedings see *State v. White*, 98 Idaho 781, 572 P.2d 884 (1977).

Instructions.

The district court properly instructed the jury on the elements of the offense of kidnapping in the second degree and the instructions adequately addressed the intent requirement of the offense, accordingly, in consideration of the instructions given and in light of the Idaho Criminal Jury Instructions preface, a separate instruction defining intent was unnecessary. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Sentence.

Where the defendants raped and sodomized a 12-year-old girl, the fixed 30-year sentence for rape, fixed 30-year sentence for lewd conduct with a minor, fixed 15-year sentence for aggravated battery, and the indeterminate 25-year sentence for second degree kidnapping were not an abuse of discretion. *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986).

The trial court did not abuse its discretion in its imposition of a suspended indeterminate ten-year sentence for the crime of second degree kidnapping. *State v. Chapman*, 112 Idaho 1011, 739 P.2d 310 (1987).

Where defendant had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use

of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for rehabilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

The district court properly sentenced defendant to a nine-year determinate period of confinement to be followed by a three and one-half year indeterminate period with regard to a charge of attempted kidnapping in

the second degree where the court considered all of the appropriate goals of sentencing in light of the circumstances of this particular case, and concluded that defendant's substance abuse in this case did not mitigate the seriousness of the offense, and that the community had a right to expect not to be treated as defendant had treated the victim. *State v. Connor*, 119 Idaho 1003, 812 P.2d 310 (Ct. App. 1991).

Collateral References. Belief in legality of the act as affecting offense. 114 A.L.R. 870.

Necessity and sufficiency of showing in kidnapping prosecution, that detention was with intent to "secretly" confine victim. 98 A.L.R.3d 733.

Kidnaping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

18-4504. Punishment — Liberation of kidnapped person. —

1. Every person guilty of kidnapping in the first degree shall suffer death or be punished by imprisonment in the state prison for life, provided a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty as required under the provisions of section 18-4504A, Idaho Code, and provided further that the sentence of death shall not be imposed if prior to its imposition the kidnapped person has been liberated unharmed.

2. Kidnaping in the second degree is punishable by imprisonment in the state prison not less than one (1) nor more than twenty-five (25) years. [I.C., § 18-4504, as added by 1972, ch. 336, § 1, p. 844; am. 1980, ch. 298, § 1, p. 775; am. 2000, ch. 126, § 1, p. 299.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 51; R.S., R.C., & C.L., § 6585; am. 1919, ch. 166, § 2, p. 534; C.S., § 8225; I.C.A., § 17-1304; am. 1937, ch. 16, § 1, p. 26, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984); *State v. Spurgeon*, 107 Idaho 173, 687 P.2d 17 (Ct. App. 1984); *State v. Grob*, 107 Idaho 496, 690 P.2d 951 (Ct. App. 1984); *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Smith*, 122 Idaho 560, 835 P.2d 1371 (Ct. App. 1992).

ANALYSIS

Sentence.

—Not excessive.

—Not unreasonable.

Sentence.

Fifteen year concurrent indeterminate sentences with a five year indeterminate enhancement for use of a deadly weapon were not excessive when imposed on a defendant who pled guilty to second-degree kidnapping and aggravated battery even though the defendant had no prior record when considering the brutal nature of the crimes. *State v. Fink*, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985).

The defendant's sentence of 25-years for first-degree kidnapping did not meet the mandatory life imprisonment penalty prescribed by the kidnapping statute; therefore, the Court of Appeals remanded to the district court to impose a life sentence for first-degree kidnapping, which sentence may be either indeterminate or fixed, in the discretion of the district court. *State v. Nellsch*, 110 Idaho 594, 716 P.2d 1366 (Ct. App. 1986).

The district court properly sentenced defendant to a nine-year determinate period of confinement to be followed by a three and one-half year indeterminate period with re-

gard to a charge of attempted kidnapping in the second degree where the court considered all of the appropriate goals of sentencing in light of the circumstances of this particular case, and concluded that defendant's substance abuse in this case did not mitigate the seriousness of the offense, and that the community had a right to expect not to be treated as defendant had treated the victim. *State v. Connor*, 119 Idaho 1003, 812 P.2d 310 (Ct. App. 1991).

—Not Excessive.

Where defendant abducted the victim at gunpoint from her car, struck her on the head when she refused to disrobe, and shot her twice when she attempted to escape, consecutive sentences for the maximum term of confinement on respective counts of second degree kidnapping, assault with intent to commit infamous crime against nature, and assault with intent to commit murder were not excessive. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976) (decision prior to 1980 amendment).

There was no abuse of discretion in sentencing the defendant to the maximum indeterminate sentences available for the crimes of second-degree kidnapping and aiding and abetting in the commission of aggravated battery, where the court considered the defendant's active participation in the kidnap and murder of the victim, the need for appropriate retribution, and the mitigating factors, including the unusually large number of favorable character attestations on the defendant's behalf. *State v. Hemenway*, 111 Idaho 839, 727 P.2d 1267 (Ct. App. 1986).

With regard to a sentence of lifetime probation for first degree kidnapping, where the trial court found that the victim was harmed before she was released, not only was the sentence not excessive, but the trial court displayed leniency by suspending the execution of judgment on the sentence and placing the defendant on probation. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

Where attorney for defendant charged with kidnapping and raping a 15-year-old girl stated twice before the district judge that the recommended sentences were appropriate given the plea negotiations entered into by defendant, where the district judge took time to question defendant about the reasonableness of his plea, where the plea of guilty was conditional in the sense that the judge was bound not to impose a sentence which exceeded the prosecutor's recommendation, where defendant agreed to the recommendation, as shown by the statements of his counsel, and where defendant was told that if the court determined the recommended sentence to be inappropriate, the court would permit defendant to withdraw his guilty plea, under these cir-

cumstances, defendant was in a poor situation to question the length of his negotiated sentences for rape and kidnapping in the second degree where he received concurrent unified sentences of 20 years, each with a five-year minimum period of confinement. *State v. Leyva*, 117 Idaho 462, 788 P.2d 863 (Ct. App. 1990).

Where defendant convicted of aggravated assault, second degree kidnapping, misdemeanor battery, and use of a firearm in the commission of a crime, had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for rehabilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Where defendant picked up a five-year old boy while he was walking to kindergarten and transported him to a remote area in his pickup truck, slapped the boy, took off all of the boy's clothes and touched him by his legs in a place the boy described as "nasty," a life term with a minimum period of confinement of 15 years was not an abuse of discretion. *State v. Estes*, 120 Idaho 953, 821 P.2d 1008 (Ct. App. 1991).

Where defendant was charged with kidnapping and assaulting a nine-year-old girl, with the intent of committing a lewd and lascivious act, although defendant did not have a criminal record and had a fairly stable family and work history, a sentence of seven years fixed, followed by an indeterminate period of confinement of 13 years on the kidnapping charge, and a term of five years fixed, to be followed by an indeterminate period of five years on the assault charge was not an abuse of discretion. *State v. Soto*, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

Where defendant pled guilty to second degree kidnapping, sentence of twenty-five years with a fifteen-year minimum period of con-

finement was not an abuse of discretion. *State v. Walker*, 125 Idaho 11, 867 P.2d 244 (1993).

Considering the nature of the crime (kidnapping and murder) and defendant's character, as exemplified by his conduct (subsequent concealment of the murder) and the circumstances surrounding the offense, the district court did not abuse its discretion in imposing a minimum fifteen year term of incarceration. *State v. Olivera*, 131 Idaho 628, 962 P.2d 399 (Ct. App. 1998).

There was no abuse of discretion in giving defendant the maximum sentence where the sentencing court was permitted to consider the defendant's alleged criminal conduct for which he had not been convicted or for which charges had been dismissed, and the record demonstrated that the district court took into account the overriding sentencing goal of the protection of society and appropriately concluded that defendant presented a grave threat of reoffense if he were not imprisoned. *State v. Thomas*, 133 Idaho 800, 992 P.2d 795 (Ct. App. 1999).

—**Not Unreasonable.**

A sentence of a minimum period of confinement of eight years for conviction of rape,

burglary, kidnapping and the infamous crime against nature was not unreasonable where defendant was on probation at the time he committed the crimes, he violated a restraining order and had a prior criminal record. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

Where defendant was an adult male who had forcefully abducted a young girl who was walking to school and molested her and defendant was a prior sex offender, a sentence of a fixed term of eighteen years for first-degree kidnapping was reasonable. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992), *aff'd*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

The fact that the state was, at one time, willing to agree to a fixed term of imprisonment less than that eventually recommended at sentencing was not determinative on appeal, and based on the callous nature of defendant's crime and its ultimate result, defendant's unified sentence for first degree kidnapping of life imprisonment, with fifteen years fixed, was reasonable and necessary to effectuate the goals of sentencing. *State v. Weaver*, 135 Idaho 5, 13 P.3d 5 (Ct. App. 2000).

18-4504A. Notice of intent to seek death penalty. — A sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty with the court and served the notice upon the defendant or his attorney of record no later than thirty (30) days after entry of a plea. A notice of intent to seek the death penalty may be withdrawn at any time prior to the imposition of sentence. [I.C., § 18-4504A, as added by 2000, ch. 126, § 2, p. 299.]

18-4505. Inquiry into mitigating or aggravating circumstances — Sentence in kidnapping cases — Statutory aggravating circumstances — Judicial findings. — 1. After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

2. Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless a notice of intent to seek the death penalty was filed and served as provided in section 18-4504A, Idaho Code, and the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

3. In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according

to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

4. Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

5. Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

6. The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(a) The victim of the kidnapping was subjected by the kidnapper or those acting in concert with him to torture, maiming or the intentional infliction of grievous mental or physical injury.

(b) The defendant knowingly created a great risk of death to any person, including the kidnapped.

(c) The kidnapping was committed for remuneration or the promise of remuneration or the defendant employed another to commit the kidnapping for remuneration or the promise of remuneration.

(d) The kidnapping was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(e) The kidnapping was committed for the purpose of murdering or maiming a witness or potential witness in a judicial proceeding. [I.C., § 18-4505, as added by 1980, ch. 298, § 2, p. 775; am. 2000, ch. 126, § 3, p. 299.]

Compiler's notes. Section 3 of S.L. 1980, ch. 298 declared an emergency. Approved April 1, 1980.

Cited in: State v. Spurgeon, 107 Idaho 175, 687 P.2d 19 (Ct. App. 1984).

18-4506. Child custody interference defined — Defenses — Punishment. — 1. A person commits child custody interference if the person, whether a parent or other, or agent of that person, intentionally and without lawful authority:

(a) Takes, entices away, keeps or withholds any minor child from a parent or another person or institution having custody, joint custody, visitation or other parental rights, whether such rights arise from temporary or

permanent custody order, or from the equal custodial rights of each parent in the absence of a custody order; or

(b) Takes, entices away, keeps or withholds a minor child from a parent after commencement of an action relating to child visitation or custody but prior to the issuance of an order determining custody or visitation rights.

2. It shall be an affirmative defense to a violation of the provisions of subsection 1. of this section that:

(a) The action is taken to protect the child from imminent physical harm;

(b) The action is taken by a parent fleeing from imminent physical harm to himself;

(c) The action is consented to by the lawful custodian of the child; or

(d) The child is returned within twenty-four (24) hours after expiration of an authorized visitation privilege.

3. A violation of the provisions of subsection 1. of this section shall be a felony, unless the defendant did not take the child outside the state, and the child was voluntarily returned unharmed prior to the defendant's arrest in which case the violation shall be reduced to a misdemeanor.

4. Any reasonable expenses incurred by a lawful custodian in locating or attempting to locate a child taken in violation of the provisions of subsection 1. of this section may be assessed against the defendant at the court's discretion in accordance with chapter 53, title 19, Idaho Code. [I.C., § 18-4506, as added by 1987, ch. 88, § 1, p. 167.]

Cited in: State v. Smith, 122 Idaho 560, 835 P.2d 1371 (Ct. App. 1992).

ANALYSIS

Failure to return child.
Jurisdiction.

Failure to Return Child.

Where father under the temporary custody agreement, had a duty to return custody of daughter to ex-wife, his failure to return daughter deprived ex-wife of her custodial rights and exposed him to criminal prosecution under this section. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

Jurisdiction.

Where the second and third elements of the crime of child custody interference, the keep-

ing or withholding and the deprivation of the custodial rights, occurred in Idaho, under I.C. §§ 18-202, 19-301 and 19-302, the state had jurisdiction over the crime. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

Because the withholding of the child from the custodial parent in violation of a court order is no different than the withholding of support from a family in violation of a court order, the keeping or withholding occurs, for purposes of jurisdiction, where the defendant is required to return the child to the custodial parent. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

18-4507. Short title. — Sections 18-4507, 18-4508, 18-4509, 18-4510 and 18-4511, Idaho Code, may be cited as the "Missing Child Reporting Act." [I.C., § 18-4507, as added by 1988, ch. 281, § 1, p. 912.]

18-4508. Definitions. — As used in sections 18-4507, 18-4508, 18-4509, 18-4510 and 18-4511, Idaho Code:

(1) "Law enforcement agency" means any law enforcement agency of the state or any political subdivision of the state, including the Idaho state police and any municipal or county sheriff department.

(2) “Missing child” means an individual who is less than eighteen (18) years of age who is reported to any law enforcement agency as abducted or lost.

(3) “Runaway child” means an individual who is less than eighteen (18) years of age who is reported to any law enforcement agency as a runaway.

(4) “State registrar” means the employee so designated by the director of the department of health and welfare. [I.C., § 18-4508, as added by 1988, ch. 281, § 1, p. 912; am. 1989, ch. 219, § 1, p. 532; am. 2000, ch. 469, § 23, p. 1450.]

Compiler’s notes. Section 22 of S.L. 2000, ch. 469 is compiled as § 18-3302.

18-4509. Missing child reports — Law enforcement agencies — Duties. — (1) Upon receiving a report of a missing or runaway child, a law enforcement agency shall immediately enter identifying and descriptive information about the child into the national crime information center computer. Law enforcement agencies having direct access to the national crime information center computer shall enter and retrieve the data directly and shall cooperate in the entry and retrieval of data on behalf of law enforcement agencies which do not have direct access to the system.

(2) If the local law enforcement agency has reason to believe that a missing or runaway child is enrolled in an Idaho elementary or secondary school, it shall notify that school of the report, at which time the school shall flag the missing child’s record pursuant to section 18-4511, Idaho Code.

(3) The Idaho state police shall report the entries made by local law enforcement in the national crime information center to the state registrar. Upon learning of the return of a missing or runaway child, the Idaho state police shall so notify the state registrar of this state if the child was born in Idaho, or the appropriate officer in the state where the child was born, and the school informed under the provisions of subsection (2) of this section.

(4) The Idaho state police shall by rule determine the frequency, manner and form of notices and reports required by this act.

(5) Immediately after a missing or runaway child is returned, the law enforcement agency having jurisdiction over the investigation shall clear the entry from the national crime information center computer. [I.C., § 18-4509, as added by 1988, ch. 281, § 1, p. 912; am. 1989, ch. 219, § 2, p. 532; am. 1999, ch. 12, § 1, p. 16; am. 2000, ch. 469, § 24, p. 1450.]

Compiler’s notes. The words “this act” refer to S.L. 1988, ch. 281, which is compiled as §§ 18-4507 — 18-4511.

Section 2 of S.L. 1999, ch. 12, is compiled as § 18-4512.

Section 25 of S.L. 2000, ch. 469 is compiled as § 18-4511.

Sec. to sec. ref. This section is referred to in § 18-4507.

18-4510. Birth records of missing children — State registrar’s duties. — 1. Upon notification by a law enforcement agency that a child born in the state is missing or has run away, the state registrar shall flag the child’s birth certificate record in such a manner that whenever a copy of the birth certificate or information concerning the birth record is requested, the

state director shall be alerted to the fact that the certificate is that of a missing or runaway child.

2. In response to any inquiry, the state registrar or any clerk appointed by him or any employee of vital statistics shall not provide a copy of a birth certificate or information concerning the birth record of any missing or runaway child whose birth record has been flagged pursuant to this section, and shall immediately notify the law enforcement agency having jurisdiction over the investigation of the missing or runaway child. Inquiries shall be handled in the following manner:

(a) When a copy of the birth certificate of a missing or runaway child whose record has been flagged is requested in person, the employee receiving the request shall immediately notify his supervisor or the state registrar. The person making the request shall complete a form supplying his name, address, telephone number and relationship to the missing or runaway child and the name, address and birth date of the missing or runaway child. The driver's license of the person making the request, if available, shall be photocopied and returned to him. He shall be informed that the birth certificate will be mailed to him when it is released. The employee shall note the physical description of the person making the request, and, upon that person's departure from the vital statistics office, the supervisor or state registrar shall immediately notify the law enforcement agency having jurisdiction of the request and provide it with the information obtained pursuant to subsection 2(a) of this section. The state registrar shall retain the form completed by the person making the request.

(b) When a copy of the birth certificate of a missing or runaway child whose birth record has been flagged is requested in writing, the state registrar shall immediately notify the law enforcement agency having jurisdiction of the request and shall provide a copy of the written request. The state registrar shall retain the original written request.

3. Upon notification by a law enforcement agency that a missing or runaway child has been returned or when the child reaches his eighteenth birthday, the state registrar shall remove the flag from the child's birth record. [I.C., § 18-4510, as added by 1988, ch. 281, § 1, p. 912; am. 1989, ch. 219, § 3, p. 532.]

Sec. to sec. ref. This section is referred to in §§ 18-4507 and 18-4508.

18-4511. School duties — Records of missing child — Identification upon enrollment — Transfer of student records. — (1) Upon notification by the Idaho state police of a missing or runaway child report, the school in which the child is currently enrolled shall flag the record of that child in such a manner that whenever a copy of or information regarding the record is requested, the school shall be alerted to the fact that the record is that of a missing or runaway child. The school shall immediately report to the local law enforcement agency any request concerning flagged records or knowledge as to the whereabouts of the missing or runaway child. Upon notification by the Idaho state police of the return of

the missing or runaway child, the school shall remove the flag from the child's record.

(2) Upon enrollment of a student for the first time in a public or private elementary or secondary school, the school shall notify in writing the person enrolling the student that within thirty (30) days he must provide either a certified copy of the student's birth certificate or other reliable proof of the student's identity and birthdate, which proof shall be accompanied by an affidavit explaining the inability to produce a copy of the birth certificate. Other reliable proof of the student's identity and birthdate may include a passport, visa or other governmental documentation of the child's identity.

(a) Upon the failure of a person enrolling a student to comply with the provisions of this subsection, the school shall immediately notify the local law enforcement agency of such failure, and shall notify the person enrolling the student, in writing, that he has ten (10) additional days to comply.

(b) The school shall immediately report to the local law enforcement agency any documentation or affidavit received pursuant to this subsection which appears inaccurate or suspicious in form or content.

(3) Within fourteen (14) days after enrolling a transfer student, the public or private elementary or secondary school shall request directly from the student's previous school a certified copy of his record. The requesting school shall exercise due diligence in obtaining the copy of the record requested. A student transferring schools within the same school district need not provide proof of identity and birthdate if the student's record already contains such verified information. Any public or private elementary or secondary school which is requested to forward a copy of a transferred student's record to the student's new school shall comply within ten (10) days of receipt of the request, unless the record has been flagged pursuant to subsection (1) of this section, in which case the copy shall not be forwarded and the school shall notify the local law enforcement agency of the request for a flagged record; provided however, that any private school accredited by the state board of education which has an agreement allowing retention of a student's record when such student's tuition or fees have not been paid may comply with the provisions of this subsection by notifying the student's new school that the transferred student's records are being held for nonpayment of tuition or fees. However, such private school shall be required to notify the local law enforcement agency if the student's record has been flagged pursuant to the provisions of subsection (1) of this section, even if the student's tuition and fees have not been paid.

(4) It shall be the duty of the local law enforcement agency to immediately investigate each report received from a school of a failure to comply with the provisions of subsection (2) or (3) of this section.

(5) Failure of a parent, or person in custody of a child, or a person enrolling a student, to comply with the documentation requirements of this section after a lawful request by a law enforcement agency, or to cooperate with a law enforcement investigation lawfully conducted pursuant to this section, shall constitute a misdemeanor. [I.C., § 18-4511, as added by 1988, ch. 281, § 1, p. 912; am. 1989, ch. 219, § 4, p. 532; am. 1992, ch. 108, § 1,

p. 337; am. 1993, ch. 188, § 1, p. 479; am. 1996, ch. 400, § 1, p. 1332; am. 2000, ch. 469, § 25, p. 1450.]

Compiler's notes. Section 24 of S.L. 2000, ch. 469 is compiled as § 18-4509.

Sec. to sec. ref. This section is referred to in §§ 18-4507 — 18-4509, 33-209.

18-4512. Missing persons clearinghouse. — (1) The Idaho state police shall establish a missing persons clearinghouse as a resource center of information and assistance regarding missing and unidentified persons.

(2) The director of the Idaho state police shall appoint a coordinator to manage appropriate programs for addressing the problem of missing persons, which may include the following:

(a) Collecting and maintaining computerized data and investigative information on missing and unidentified persons in Idaho;

(b) Establishing access to the national crime information center and to other sources of automated information;

(c) Distributing information to public and private nonprofit agencies that will assist in the location and recovery of missing persons;

(d) Operating a toll-free telephone hotline for accepting reports relating to missing persons;

(e) Publishing a directory of missing persons;

(f) Compiling statistics on missing persons cases handled and resolved each year;

(g) Developing and conducting training on issues relating to missing persons;

(h) Developing and distributing educational and other information regarding the prevention of abduction and sexual exploitation of children.

(3) The Idaho state police may accept gifts and grants from governmental agencies and private nonprofit organizations to achieve the purposes of the clearinghouse.

(4) The Idaho state police shall publish an annual report on the activities and achievements of the clearinghouse.

(5) The Idaho state police shall determine, by rule, the type and content of information to be collected by the clearinghouse and the manner of collecting and disseminating that information.

(6) The clearinghouse coordinator, in cooperation with the office of the superintendent of public instruction, shall develop a coordinated plan for the distribution of information to teachers and students in the school districts of the state regarding missing and runaway children. The superintendent of public instruction shall encourage local school districts to cooperate by providing the Idaho state police with information on any missing and runaway children that may be identified within the district. [I.C., § 18-4512, as added by 1996, ch. 367, § 1, p. 1238; am. 1999, ch. 12, § 2, p. 16; am. 2000, ch. 469, § 26, p. 1450.]

Compiler's notes. Section 1 of S.L. 1999, ch. 12 is compiled as § 18-4509.

Section 27 of S.L. 2000, ch. 469 is compiled as § 18-8002A.

CHAPTER 46

LARCENY AND RECEIVING STOLEN GOODS

SECTION.

- 18-4601 — 18-4615. [Repealed.]
 18-4616. Defacing marks on logs or lumber.
 18-4617. Stealing rides on trains.
 18-4618. Stealing rides on trains — Authority of conductors and engineers to arrest.
 18-4619. Stealing rides — Venue of action.
 18-4620. Stealing rides — Punishment.
 18-4621. Stealing electric current — Tampering with meters.
 18-4622. Stealing electric current — Accessories liable as principals.
 18-4623. Stealing electric current — Evidence of guilt.
 18-4624. Taken or converted merchandise as theft.
 18-4625. Taken or converted merchandise — Evidence.

SECTION.

- 18-4626. Wilful concealment of goods, wares or merchandise — Defense for detention.
 18-4627. Transportation of coniferous trees — Proof of ownership required.
 18-4628. Transportation of forest products — Proof of ownership required — Exceptions.
 18-4628A. Penalty for purchase without proof of ownership.
 18-4629. Penalty for transportation of forest products without a permit, contract, bill of sale, or product load receipt.
 18-4630. Illegal use of documents.
 18-4631. Forest sabotage — Penalty.

18-4601 — 18-4615. Larceny — Receiving stolen property. [Repealed.]

Compiler's notes. These sections, which comprised I.C., §§ 18-4601 — 18-4611, 18-4613 — 18-4615 as added by 1972, ch. 336, § 1, p. 844; I.C., § 18-4612, as added by 1978,

ch. 284, § 2, p. 691, were repealed by S.L. 1981, ch. 183, § 1. For present law see §§ 18-2401 — 18-2409.

18-4616. Defacing marks on logs or lumber. — Every person who cuts out, alters, mutilates, changes, disfigures, or defaces any legally recorded mark or marks made upon any log, lumber, or wood, or re-marks or puts a false mark thereon with intent to prevent the owner from discovering its identity, or places any mark upon, or cuts, saws, manufactures, or in any manner appropriates to his own use, or to the use of any other person, any prize log or timber, is guilty of a misdemeanor and punishable by a fine not exceeding \$500, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. In any prosecution for a violation of the provisions of this section relating to prize logs it shall be sufficient to prove that such logs are prize logs without further proof of ownership. [I.C., § 18-4616, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1885, p. 177, § 3; R.S. & R.C., § 6866; reen. C.L., § 7060a; S.L. 1919, ch. 11, § 3, p. 74; C.S., § 8442; I.C.A., § 17-3516 was

repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4617. Stealing rides on trains. — Every person who shall, at any place within this state, ride or attempt to ride upon any locomotive engine, railroad car, railroad train, or trains of any character, in or upon any part thereof, for the purpose or with the intent of stealing a ride thereon, or who shall at any place, within this state, climb upon, hold to, or in any manner attach himself to, any locomotive engine or railroad car or railroad train or

trains of any character, while the same are in motion, shall be guilty of a misdemeanor: provided, that this section shall not apply to any employee of a railroad company operating such train, locomotive or car, nor to any person operating such train, locomotive or car, nor to any person having business with, or acting under legal authority of, such railroad company. [I.C., § 18-4617, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, ch. 41, § 1; reen. R.C. & C.L., § 7061; C.S., § 8443; I.C.A., § 17-3517 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in §§ 18-4619 and 18-4620.

18-4618. Stealing rides on trains — Authority of conductors and engineers to arrest. — Authority is hereby given to and conferred upon railroad conductors and engineers of railroad trains, to immediately arrest, without warrant or other process, any person or persons violating the preceding section, and deliver such persons to any peace officer: provided, that nothing in this section contained shall be construed to restrict the authority or duty of the regular officer within the state of making arrests for said offense. [I.C., § 18-4618, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 41, § 2; reen. R.C. & C.L., § 7061a; C.S., § 8444; I.C.A., § 17-3518 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4619. Stealing rides — Venue of action. — Any person charged with a violation of section 18-4617 may be tried in any county in this state through which such train carrying such person may pass, or in the county in which such violation may have occurred or may be discovered. [I.C., § 18-4619, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 41, § 3; reen. R.C. & C.L., § 7016b; C.S., § 8445; I.C.A., § 17-3519 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Venue of action. 76 A.L.R. 1041.

18-4620. Stealing rides — Punishment. — Every person who shall be convicted of a violation of any of the offenses mentioned in section 18-4617 shall be punished by imprisonment in the county jail for a period not exceeding thirty days, or by a fine of not more than \$60.00, or by both such fine and imprisonment. [I.C., § 18-4620, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 41, § 4; reen. R.C. & C.L., § 7061c; C.S., § 8446; I.C.A., § 17-3520 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4621. Stealing electric current — Tampering with meters. —

Whoever shall without permission or authority of any person, firm or corporation engaged in the generation or distribution of electricity, make connections, or cause connections to be made, by wire or wires or by any other device, with the wires, cables or conductors, or any of them, of any such person, firm or corporation, for the purpose of obtaining or diverting electric current from such wires, cables or conductors; or whoever shall, without permission or authority from any person, firm or corporation using any meter or meters erected or set up for the purpose of registering or recording the amount of electric current supplied to any customer of such person, firm or corporation within this state, connect or cause to be connected by wire or any other device, any such meter or meters, or change or shunt the wiring leading to or from any such meter or meters, or by any device or appliance or means whatsoever tamper with any such meter or meters in such manner that such meter or meters do not measure or record the full amount of electric current supplied to such customer, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$300.00, or by imprisonment in the county jail for a term not exceeding six (6) months, or by both such fine and imprisonment: provided, that nothing herein contained shall be deemed to affect the right of any person, firm or corporation to recover by action in any court of competent jurisdiction damages for any injury done by such unlawful acts. [I.C., § 18-4621, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1905, p. 72, § 1; reen. R.C. & C.L., § 7062; C.S., § 8447; I.C.A., § 17-3521 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-4623.

ANALYSIS

Application.
Instructions.

Application.

Although the customer whose electric service was suspended for nonpayment did not succeed in restoring power through the meter, he did meet the elements of the statute where he did in fact use a device to make a connec-

tion with the power company's wires or cables, and did in fact make this connection for the purpose of obtaining electric current. The statute does not require that the connection allow one to successfully obtain or divert power. *Orthman v. Idaho Power Co.*, 134 Idaho 598, 7 P.3d 207 (2000).

Instructions.

The trial court erred in instructing the jury that diverting power from a power company's transmission lines was negligence per se, but the error was harmless because it was clear from the facts that the nonpaying customer was negligent. *Orthman v. Idaho Power Co.*, 134 Idaho 598, 7 P.3d 207 (2000).

Collateral References. Larceny of gas. 19 A.L.R. 729; 113 A.L.R. 1282; 144 A.L.R. 1383.

Electrical energy, gas, water, heat, power, etc. as the subject of larceny. 113 A.L.R. 1282.

18-4622. Stealing electric current — Accessories liable as principals. — Any person or persons aiding, abetting or counseling the acts, or any of them, mentioned in the preceding section, shall, upon conviction thereof, be equally guilty with the principals and subject to the same penalties. [I.C., § 18-4622, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1905, p. 72, § 2; reen. R.C. & C.L., § 7062a; C.S., § 8448; I.C.A., § 17-3522

was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal. **Collateral References.** Electrical energy, gas, water, heat, power, etc. as the subject of larceny. 113 A.L.R. 1282.

18-4623. Stealing electric current — Evidence of guilt. — In all prosecutions under the two (2) preceding sections, proof that any of the acts herein forbidden were done on or about the premises owned or occupied by the defendant charged with the commission of such offense, or that he received the benefit of any such electric current on account of the commission of such acts, shall be prima facie evidence of the guilt of such defendant. [I.C., § 18-4623, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1905, p. 72, § 3; reen. R.C. & C.L., § 7062b; C.S., § 8449; I.C.A., § 17-3523 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Electrical energy, gas, water, heat, power, etc. as the subject of larceny. 113 A.L.R. 1282.

18-4624. Taken or converted merchandise as theft. — A person steals property and commits theft by the alteration, transfer or removal of any label, price tag, marking, indicia of value or any other markings which aid in the determination of value of any merchandise displayed, held, stored, or offered for sale, in a retail mercantile establishment, for the purpose of attempting to purchase such merchandise either personally or in consort with another, at less than the retail price with the intention of depriving the merchant of the value of such merchandise. [I.C., § 18-4624, as added by 1980, ch. 336, § 1, p. 870.]

Compiler's notes. A former § 18-4624 which comprised S.L. 1927, ch. 132, § 1, p. 175; I.C.A., § 17-3524, was repealed by S.L. 1961, ch. 224, § 1.

18-4625. Taken or converted merchandise — Evidence. — In any prosecution for a violation of this chapter, photographs of the goods or merchandise alleged to have been taken or converted shall be deemed competent evidence of such goods or merchandise and shall be admissible in any proceeding, hearing or trial to the same extent as if such goods and merchandise had been introduced as evidence. Such photographs shall bear a written description of the goods or merchandise alleged to have been taken or converted, the name of the owner of such goods or merchandise, or the store or establishment wherein the alleged offense occurred, the name of the accused, the name of the arresting peace officer, the date of the photograph and the name of the photographer. Such writing shall be made under oath by the arresting peace officer, and the photographs identified by the signature of the photographer. Upon the filing of such photograph and writing with the authority or court holding such goods and merchandise as evidence, such goods or merchandise shall be returned to their owner, or the proprietor or manager of the store or establishment wherein the alleged offense occurred. [I.C., § 18-4625, as added by 1980, ch. 336, § 2, p. 870.]

Compiler's notes. Former § 18-4625 which comprised S. L. 1927, ch. 132, § 2, p. 175; am. S. L. 1929, ch. 189, § 1, p. 351; I. C. A., § 17-3525, was repealed by S. L. 1971, ch. 143, § 5, effective January 1, 1972, was reenacted as I. C., § 18-4625 by S. L. 1972, ch.

336, § 1, effective April 1, 1972 and repealed by S. L. 1972, ch. 381, § 17, effective April 1, 1972.

18-4626. Wilful concealment of goods, wares or merchandise — Defense for detention. — (a) Whoever, without authority, wilfully conceals the goods, wares or merchandise of any store or merchant, while still upon the premises of such store or merchant, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars (\$300) or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment. Goods, wares or merchandise found concealed upon the person shall be prima facie evidence of a wilful concealment.

(b) Any owner, his authorized employee or agent of any store or merchant, apprehending or detaining a person on or in the immediate vicinity of the premises of any store or merchant, for the purpose of investigation or questioning as to the ownership of any goods, wares or merchandise, shall have as a defense in any action, civil or criminal, that such detention of the person or persons was in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the store or merchant, his authorized employee or agent, and that such peace officer, owner, employee or agent had probable cause to believe that the person so detained was committing or attempting to commit an offense as set forth in subsection (a) of this section. "Reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the store or merchant relative to ownership of the merchandise. [I.C., § 18-4626, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 258, § 1, p. 510.]

Compiler's notes. A former section, which comprised I.C., § 18-4626, as added by S.L. 1957, ch. 178, § 1, p. 342 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Instructions.

Where defendant was found guilty by a jury of the crime of wilful concealment, and at trial, the jury was instructed on the charged offense of petit theft and also on the lesser included offense of wilful concealment, the instructions that were given adequately addressed the subject matter of the requested instruction on the statutory definition of negligence as set forth in § 18-101(2); an explanation of the mental state, wilfulness, which is a requisite for guilt of the crime of wilful concealment, was given to the jury which was

instructed that in order to find defendant guilty of wilful concealment they would have to find the state had proven beyond a reasonable doubt that defendant had wilfully concealed goods or merchandise belonging to store while still upon the premises of the store, and the jury was given a definition of "wilfully" which was drawn from, the definition in § 18-101(1). These instructions were all that were required for the statutory definition of negligence in § 18-101(2), and § 18-101(2) was not the law that governed defendant's guilt or innocence. There was no need for an instruction giving that definition of negligence to support her defense that she did not act wilfully; her contention that she was merely negligent was properly a subject for closing argument, but did not necessitate a separate jury instruction. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

18-4627. Transportation of coniferous trees — Proof of ownership required. — It shall be unlawful for any person to transport on the highways of this state, outside of incorporated cities, more than two (2)

coniferous trees without proof of ownership. Such proof of ownership shall consist of one (1) or more of the following:

(1) A tag designating the grower or producer, and/or the vendor of the tree; such tag shall be attached firmly to the branches or trunk of the tree;

(2) A permit issued by the proper state or federal agencies which shall specify:

(a) The date of its execution;

(b) The name of the permittee;

(c) The location or area where the trees were harvested; and

(d) The amount or number of trees authorized to be cut.

(3) A bill of sale showing title thereto, which shall specify:

(a) The date of its execution;

(b) The name and address of the vendor or donor of the trees;

(c) The name and address of the vendee or donee of the trees;

(d) The number of trees, by species, sold or transferred by the bill of sale; and

(e) The property from which the trees were taken.

(4) A United States department of agriculture and/or a state of Idaho marketing service grade inspection tag shall be acceptable as proof of ownership when such tags specify:

(a) The date of inspection;

(b) The name and address of the grower or producer; and

(c) The species and grade of the trees.

The foregoing provisions do not apply to:

(1) The transportation of trees in the course of transplantation, with their roots intact.

(2) The transportation of logs, poles, pilings or other forest products from which substantially all the limbs and branches have been removed.

(3) The transportation of coniferous trees by the owner of the land from which they were taken or his agent. [I.C., § 18-4627, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1961, ch. 232, § 1, p. 373; 1970, ch. 123, § 1, p. 296 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-4630.

18-4628. Transportation of forest products — Proof of ownership required — Exceptions. — (a) It shall be unlawful and constitute a misdemeanor for any person, firm, company, or business to transport on the public highways of this state any load of forest products, including coniferous trees, Christmas trees, sawlogs, poles, cedar products, pulp logs, fuelwood, etc., without proof of ownership. Such proof of ownership shall consist of one or more of the following:

(1) A permit, contract, or other legal instrument issued by the landowner or proper state or federal agencies which shall specify:

(a) Date of execution;

(b) Name and address of permittee;

(c) Location or area by legal description where forest products were harvested;

(d) Estimated amount, volume, species, and class of forest products authorized to be cut and removed;

(e) Delivery or scaling point;

(f) Name and address of purchaser of forest products if different than permittee.

(2) A bill of sale showing title thereto, which shall specify:

(a) Date of execution;

(b) Name and address of the vendor or donor of the forest products;

(c) Name and address of the vendee or donee of the forest products;

(d) Number, volume, species, and class of forest products sold or transferred by the bill of sale;

(e) Property, legal description, from which the forest products were cut and removed.

(3) A log or product load receipt or ticket issued by the seller (and) is a contract or permit condition authorizing removal of forest products. After scaling, load receipts or tickets shall be acceptable as proof of ownership when such tickets or load receipts specify:

(a) Name of sale and purchaser;

(b) Date load removed;

(c) Name of truck driver;

(d) Sale contract/permit number;

(e) Number, volume, species and class of forest products covered by the load receipts or tickets.

(b) The foregoing provisions shall not apply to:

(1) Transportation of wood chips, sawdust and bark;

(2) Transportation of forest products by the owner of the land from which forest products were taken or his agent;

(3) Transportation of two (2) or less coniferous trees; or

(4) Transportation of trees in the course of transplantation with their roots intact. [I.C., § 18-4628, as added by 1975, ch. 243, § 2, p. 653; am. 1978, ch. 252, § 1, p. 551.]

Compiler's notes. Former section 18-4628 which comprised S. L. 1961, ch. 232, § 2, p. 373, was repealed by S.L. 1971, ch. 143, § 5, and was reenacted by S. L. 1972, ch. 336, § 1 and as so reenacted was repealed by S.L. 1975, ch. 243, § 1.

The word "and" in subsection (a)(3) was enclosed in parentheses by the compiler as surplusage.

Sec. to sec. ref. This section is referred to in § 18-4630.

18-4628A. Penalty for purchase without proof of ownership. — It is unlawful and a misdemeanor for any person, firm, company, or business to purchase any load of forest products, including coniferous trees, Christmas trees, sawlogs, poles, cedar products, pulp logs, fuelwood, etc., without proof of ownership as specified in subsection (a) of section 18-4628, Idaho Code, or to fail to retain a copy of that proof of ownership for a period of at least one (1) year from the date of purchase. [I.C., § 18-4628A, as added by 1978, ch. 252, § 2, p. 551.]

Compiler's notes. Section 3 of S.L. 1978, ch. 252 is compiled as § 18-4630.

Sec. to sec. ref. This section is referred to in § 18-4630.

18-4629. Penalty for transportation of forest products without a permit, contract, bill of sale, or product load receipt. — Violation of the provisions of this act shall constitute a misdemeanor, and upon conviction, be punishable by a fine of not to exceed three hundred dollars (\$300), or by imprisonment in the county jail not exceeding six (6) months, or both. [I.C., § 18-4629, as added by S.L. 1975, ch. 243, § 3, p. 653.]

Compiler's notes. The words "this act" refer to S.L. 1975, ch. 243 compiled herein as §§ 18-4628, 18-4629.

18-4630. Illegal use of documents. — It is unlawful for any person, firm, company, or business to use any of the following documents for fraudulent or illegal purposes:

(a) Log or product load receipt or ticket, permit, contract, or other instrument under the transportation of forest products act, sections 18-4627 through 18-4630, Idaho Code;

(b) Certificates of compliance under the Idaho forestry act, sections 38-101 through 38-133, Idaho Code;

(c) Certificate of notification under the Idaho forest practices act, sections 38-1301 through 38-1312, Idaho Code. Any person, firm, company, or business which knowingly uses any of the above mentioned documents in a fraudulent or illegal manner is guilty of a felony. [I.C., § 18-4630, as added by 1978, ch. 252, § 3, p. 551.]

Compiler's notes. Section 2 of S.L. 1978, ch. 252 is compiled as § 18-4628A.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4631. Forest sabotage — Penalty. — (1) Every person who maliciously drives or places, in any tree, saw-log, shingle-bolt or other wood, any iron, steel, ceramic, or other substance sufficiently hard to injure saws, knowing that the tree is intended to be harvested or that the saw-log, shingle-bolt, or other wood is intended to be manufactured into any kind of lumber or other wood product, is guilty of a felony.

(2) Any person who violates the provisions [provisions] of subsection (1) of this section and causes great bodily injury to another person other than an accomplice shall be sentenced to an extended term of imprisonment pursuant to section 19-2520B, Idaho Code. [I.C., § 18-4631, as added by 1988, ch. 322, § 1, p. 981.]

Compiler's notes. The bracketed word "provisions" in subsection (2) was inserted by the compiler.

CHAPTER 47

LEGISLATIVE POWER

SECTION.

- 18-4701. Alteration of bills.
- 18-4702. Alteration of enrolled copies.
- 18-4703. Offering bribes to legislators.
- 18-4704. Legislators receiving bribes.

SECTION.

- 18-4705. Refusal to testify before legislature.
- 18-4706. Disqualification to hold office on conviction.
- 18-4707. [Repealed.]

18-4701. Alteration of bills. — Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of [a] felony. [I.C., § 18-4701, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6410; C.S., § 8131; I.C.A., § 17-601 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The bracketed word “a” was inserted by the compiler.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-4702. Alteration of enrolled copies. — Every person who fraudulently alters the enrolled copy of any bill or resolution which has been passed or adopted by the legislature with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published by the printer of the statutes, in language different from that in which it was passed or adopted by the legislature, is guilty of [a] felony. [I.C., § 18-4702, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6411; C.S., § 8132; I.C.A., § 17-602 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The bracketed word “a” was inserted by the compiler.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-4703. Offering bribes to legislators. — Every person who gives or offers to give a bribe to any member of the legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is guilty of a felony. [I.C., § 18-4703, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised Cr. & P. 1864, § 92; R.S., R.C., & C.L., § 6412; C.S., § 8133; I.C.A., § 17-603 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. “Bribe” defined, § 18-101.

Bribery generally, § 18-2701, and notes.

Incriminating testimony may be required, § 18-1308.

Penalty for felony when not otherwise provided, § 18-112.

Collateral References. Other bribery or acceptance of bribe, admissibility of evidence tending to show commission of, in prosecution for bribery or accepting bribes. 20 A.L.R.2d 1012.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery. 67 A.L.R.3d 1231.

Who is public official within meaning of federal statute punishing bribery of public official (18 U.S.C.A. § 201). 161 A.L.R. Fed. 491.

18-4704. Legislators receiving bribes. — Every member of either of the houses composing the legislature of this state who asks, receives or agrees to receive, any bribe, upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give, any official vote in consideration that another member of the legislature shall give any such vote either upon the same or another question, is guilty of a felony. [I.C., § 18-4704, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 92; R.S., R.C., & C.L., § 6413; C.S., § 8134; I.C.A., § 17-604 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Collateral References. Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery. 55 A.L.R.2d 1137.

18-4705. Refusal to testify before legislature. — Every person who, being summoned to attend as witness before either house of the legislature or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before either house of the legislature or any committee thereof, wilfully refuses to be sworn or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor. [I.C., § 18-4705, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6414; C.S., § 8135; I.C.A., § 17-605 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972,

ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-4706. Disqualification to hold office on conviction. — Every member of the legislature convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this state. [I.C., § 18-4706, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, §§ 92, 93; R.S., R.C.,

& C.L., § 6415; C.S., § 8136; I.C.A., § 17-606 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4707. Lobbying. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-4707 as added by S.L. 1972, ch. 336, § 1 was repealed by Init. Mea-

sure 1974, No. 1, p. 29. For present law see §§ 67-6617 — 67-6628.

CHAPTER 48

LIBEL

SECTION.

- 18-4801. Libel defined.
- 18-4802. Punishment for libel.
- 18-4803. Truth may be proved — Malice — Jury to determine law and fact.
- 18-4804. Malice presumed.
- 18-4805. Sufficiency of publication.

SECTION.

- 18-4806. Liability of authors, editors and proprietors.
- 18-4807. Report of public proceeding.
- 18-4808. Limitation on privilege in reporting public proceedings.
- 18-4809. Threats to publish libel — Extortion.

18-4801. Libel defined. — A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt or ridicule. [I.C., § 18-4801, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 126; R.S., R.C., & C.L., § 6737; C.S., § 8253; I.C.A., § 17-1501, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal. Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

ANALYSIS

- Civil action for libel.
- Indictment and information.
- Libelous matter defined.
- Privilege.

Civil Action for Libel.

Complaint charging publication of matter not libelous per se, but of such character that it might expose person about whom it is written to public hatred, contempt, or ridicule and cause injury to his business, is good against general demurrer. *Jenness v. Co-Operative Publishing Co.*, 36 Idaho 697, 213 P. 351 (1923). Where publication is not libelous per se and no malice or resulting damage is shown, verdict for substantial damages will be set aside. *Jenness v. Co-Operative Publishing Co.*, 36 Idaho 697, 213 P. 351 (1923).

The Supreme Court of Idaho has applied this statute to civil actions for libel brought against newspapers and persons, and its decisions defining civil libel thereunder are controlling. *Sweeney v. Capital News Publishing Co.*, 37 F. Supp. 355 (D. Idaho 1941). In connection with this case see *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288 (2d Cir. 1941), *aff'd*, 316 U.S. 642, 62 S. Ct. 1031, 86 L. Ed. 1727 (1942); *Sweeney v. Patterson*, 128 F.2d 457 (D.D.C. 1942), *cert. denied*, 317 U.S. 678, 63 S. Ct. 160, 87 L. Ed. 544 (1942). When one rests his case solely upon the contention that a recovery is to be had because the article is libelous per se, the court must look to the words in the article, and their tendency, and cannot go beyond that and apply other words by innuendo to support the conclusion that the article is libelous per se. *Sweeney v. Capital News Publishing Co.*, 37 F. Supp. 355 (D. Idaho 1941). In connection with this case see *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288 (2d Cir. 1941), *aff'd*, 316 U.S. 642, 62 S. Ct. 1031, 86 L. Ed. 1727 (1942); *Sweeney v. Patterson*, 128 F.2d 457 (D.D.C. 1942), *cert. denied*, 317 U.S. 678, 63 S. Ct. 160, 87 L. Ed. 544 (1942). A newspaper article was not libelous per se which charged that a congressman was opposing the appointment of a named person to a

federal judgeship on the ground that he was a Jew and one not born in the United States, and that the congressman was "irate" and was endeavoring to call a caucus of Ohio congressman to protest the appointment, and that the congressman was known as the chief congressional spokesman of Father Coughlin. *Sweeney v. Capital News Publishing Co.*, 37 F. Supp. 355 (D. Idaho 1941). In connection with this case see *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288 (2d Cir. 1941), *aff'd*, 316 U.S. 642, 62 S. Ct. 1031, 86 L. Ed. 1727 (1942); *Sweeney v. Patterson*, 128 F.2d 457 (D.D.C. 1942), *cert. denied*, 317 U.S. 678, 63 S. Ct. 160, 87 L. Ed. 544 (1942).

In libel action where the complaint alleged that publication was maliciously intended to injure plaintiff generally, the question of malice was for the jury. *Browder v. Cook*, 59 F. Supp. 225 (D. Idaho 1944).

The injurious character of a published article is presumed when the same violates the rights of an individual, injures his good name and holds him up to public ridicule, hatred and scorn of his fellow men, and special damages need not be pleaded or proved. *Browder v. Cook*, 59 F. Supp. 225 (D. Idaho 1944).

In order to hold a publication libel per se it must appear that same, standing alone without aid of extrinsic evidence, would tend to injure plaintiff in business, occupation, ruin his name and expose him to public ridicule. *Browder v. Cook*, 59 F. Supp. 225 (D. Idaho 1944).

In determining whether a certain publication was libel per se the question to be settled is, what in fact was charged and what the public, who reads the article, might reasonably suppose was intended. *Browder v. Cook*, 59 F. Supp. 225 (D. Idaho 1944).

Indictment and Information.

Information which sets forth the libelous matter in *haec verba*, prefacing with words "that is to say," is good upon demurrer. *Bonney v. State*, 3 Idaho 288, 29 P. 185 (1892).

Libelous Matter Defined.

Under this section it is not necessary that alleged libelous matter charge person named with a crime. Coupling public official's name with the word "graft" is libelous per se. *State v. Sheridan*, 14 Idaho 222, 93 P. 656, 15 L.R.A. (n.s.) 497 (1908).

In libel case words will be construed according to their plain, popular, natural, and ordinary sense and as they would naturally be understood by persons hearing or reading them, unless it affirmatively appears that they were used and understood in some other sense. *State v. Sheridan*, 14 Idaho 222, 93 P. 656, 15 L.R.A. (n.s.) 497 (1908).

Written publication charging one with wilful falsehood in the matter of a serious busi-

ness transaction must necessarily expose him to contempt and lower him in the common estimation of citizens and is therefore actionable per se. *Dwyer v. Libert*, 30 Idaho 576, 167 P. 651, Ann. Cas. 1918B, 973 (1917).

In libel action where plaintiff was allegedly referred to as a peeping tom, stool pigeon, as a Jekyll and Hyde and as a New Deal Gestapo, plaintiff's complaint could not be dismissed on the ground that it did not state a cause of action and the objections to the complaint were matters of defense to be left to the jury under proper instructions. *Browder v. Cook*, 59 F. Supp. 225 (D. Idaho 1944).

In a mortgage foreclosure action against an attorney and his client, an allegation that the client had made payments of \$100 a month to the attorney for application on the mortgage accompanied by a prayer that the attorney be required to account for such payments and to pay same over toward the mortgage debt was not libelous per se. *Bistline v. Eberle*, 88 Idaho 473, 401 P.2d 555 (1965).

Privilege.

The expression of an opinion concerning judicial proceedings is not privileged. *State v. Sheridan*, 14 Idaho 222, 93 P. 656, 15 L.R.A. (n.s.) 497 (1908).

Ends of justice and public good can be best served by allowing litigants to freely plead any pertinent or material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter that is neither pertinent nor material to subject under inquiry. *Carpenter v. Grimes Pass Placer Mining Co.*, 19 Idaho 384, 114 P. 42 (1911).

Complaint against public officer filed with the body having the right of his discharge is conditionally privileged upon good faith and in absence of malice. *Dwyer v. Libert*, 30 Idaho 576, 167 P. 651, Ann. Cas. 1918B, 973 (1917).

Where defendant who had replaced plaintiff as attorney in litigation pending in district court wrote a letter to judge and mailed copies of same to various attorneys in which he requested that brief filed by plaintiff be withdrawn since portions of brief were malicious, scurrilous, definitely improper and unethical, and that plaintiff had indulged in a profusion of diabolical name calling, impertinent assertions, false statements, and prejudicial half truths the letter was libelous per se but since it was privileged as a publication in the due course of judicial proceeding there was no liability. *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953).

The assailed report classifying child as "feeble-minded," also making another statement, both of which were the basis for libel action, was made by an experienced psychologist on solicitation by a doctor to whom the youngster

had been taken for treatment for claustrophobia and the court was convinced that such report, though qualifiedly privileged, was positively free from any actionable malice whatsoever, further such report had been made by the psychologist as a public official. *Iverson v. Frandsen*, 237 F.2d 898 (10th Cir. 1956).

Collateral References. 50 Am. Jur. 2d, Libel and Slander, § 1 et seq.

53 C.J.S. Libel and Slander, § 1 et seq.

Privilege of communication in relation to member, or prospective member, of society, other than church. 3 A.L.R. 1654; 15 A.L.R. 453; 18 A.L.R. 293; 28 A.L.R. 1345; 35 A.L.R. 1414; 45 A.L.R. 1234; 59 A.L.R. 735; 82 A.L.R. 709; 90 A.L.R. 119.

Charging one with failure to keep his contracts. 5 A.L.R. 1362.

Communications by employer to surety company regarding employee. 11 A.L.R. 1014.

Charging one with being a "slacker." 11 A.L.R. 1017; 49 A.L.R. 260; 140 A.L.R. 1533; 141 A.L.R. 1526.

Reports or statements about school pupils. 12 A.L.R. 147.

Charging merchant with using false weights or measures. 13 A.L.R. 1019.

Entrapment to commit crime. 18 A.L.R. 160; 66 A.L.R. 478; 86 A.L.R. 263.

Character of libel or slander for which criminal prosecution will lie. 19 A.L.R. 1470.

Candidates, criminal responsibility for libel. 19 A.L.R. 1489.

"Infamous offense," libel as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1013.

Mistake in statement or publication as to name or description of person to whom it relates as affecting libel or slander. 26 A.L.R. 454; 41 A.L.R. 485.

Abusive words. 37 A.L.R. 883.

Libel or slander affecting bank. 37 A.L.R. 1348.

False imputation of matrimonial intentions. 44 A.L.R. 1424.

Words as criminal offense other than libel or slander. 48 A.L.R. 83.

Imputing disposition to avoid service in war. 49 A.L.R. 260.

Imputation that property sold or offered for sale is subject to an encumbrance. 50 A.L.R. 279.

Charging one with being a bastard or illegitimate. 53 A.L.R. 548.

Defamation of one in his character as a political leader or "boss." 55 A.L.R. 854.

Imputation of drunkenness. 58 A.L.R. 1159.

Publication or statement reflecting on stockholder or officer as well as upon corporation. 58 A.L.R. 1233.

Qualified privilege of publications in newspaper of general or restricted circulation. 92 A.L.R. 1029.

Necessity that words published involve imputation of crime, to constitute libel per se. 105 A.L.R. 932.

Publishing that lawyer solicits business. 112 A.L.R. 177; 46 A.L.R.4th 326.

Indebtedness of employee, privilege in respect of communication to employer regarding. 151 A.L.R. 1104.

Communication to defendant's employee or business associate as privileged. 166 A.L.R. 114.

Police or other peace officer, liability of. 13 A.L.R.2d 897.

Labor relations or disputes, statements regarding. 19 A.L.R.2d 694.

Joinder in defamation action, of denial and plea of truth of statement. 21 A.L.R.2d 813.

Briefs, statements in. 32 A.L.R.2d 423.

Religious and racial intolerance, imputation of. 33 A.L.R.2d 1219.

Liability for statement or publication representing plaintiff as cruel to or killer of animals. 39 A.L.R.2d 1388.

Statements or utterances by member of municipal council, or of governing body of other political subdivision, in course of official proceedings. 40 A.L.R.2d 941.

Judges, findings, reports, or the like. 42 A.L.R.2d 825.

Administrative proceedings, privilege applicable to judicial proceedings as extending to. 45 A.L.R.2d 1296.

Action for libel as remedy of workman blacklisted by. 46 A.L.R.2d 1132.

Race, color, or nationality, statements respecting. 46 A.L.R.2d 1287.

Grand jury, proceedings, presentments, investigations, reports of. 48 A.L.R.2d 716.

Raising defense of privilege and defamation action. 51 A.L.R.2d 552.

Statement or publication that plaintiff has been indicted or is under indictment, as defamation. 52 A.L.R.2d 1178.

Actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public officer or employee. 53 A.L.R.2d 8.

Insurance company's liability for libel or slander by its agents or employees. 55 A.L.R.2d 828.

Conditional or alternative form, defamatory nature of charges or imputations in. 59 A.L.R.2d 928.

Argument to jury, statements in. 61 A.L.R.2d 1300.

Literary or artistic works, criticism of. 64 A.L.R.2d 245.

Venue generally. 70 A.L.R.2d 1340.

Privilege in connection with proceedings to disbar or discipline attorney. 77 A.L.R.2d 493.

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities. 87 A.L.R.2d 453.

Liability of parent or person in local parentage for defamation of minor child. 90 A.L.R.2d 462.

Accidental communication, publication by. 92 A.L.R.2d 219; 62 A.L.R.4th 616.

Constitutional aspects of libel or slander of public officials. 95 A.L.R.2d 1450.

Liability of publisher of defamatory statement for its repetition or republication by others. 96 A.L.R.2d 373.

Imputing credit unworthiness to non-trader. 99 A.L.R.2d 700.

Charge of being "crook." 1 A.L.R.3d 844.

False news reports as to birth, betrothals, marriages, divorces, or similar marital matters. 9 A.L.R.3d 559.

Statements as to plaintiff's charging excessive or exorbitant prices or fees. 11 A.L.R.3d 884.

Actionability of charge of being a "slut," "bitch," or "son of a bitch." 13 A.L.R.3d 1286.

Libel by will. 21 A.L.R.3d 754.

Actionability of imputing to private person mental disorder or incapacity, or impairment of mental faculties. 23 A.L.R.3d 652.

Actionability of accusation or imputation of shoplifting. 29 A.L.R.3d 961.

Actionability of accusation or imputation of tax evasion. 32 A.L.R.3d 1427.

Public officer's privilege in connection with accusation that another has been guilty of sedition, subversion, espionage, or similar behavior. 33 A.L.R.3d 1330.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Actionability of statements imputing inefficiency or lack of qualification to public school teacher. 40 A.L.R.3d 490.

Qualified privilege or reply to defamatory publication. 41 A.L.R.3d 1083.

What constitutes "publication" in libel in order to start running of period of limitations. 42 A.L.R.3d 807.

Privilege of reporting judicial proceedings as extending to proceeding held in secret or as to which record is sealed by court. 43 A.L.R.3d 634.

Right of governmental entity to maintain action for defamation. 45 A.L.R.3d 1315.

Imputation of insolvency as defamation. 49 A.L.R.3d 163.

Charges of slumlordism or the like as actionable. 49 A.L.R.3d 1074.

Defamation by radio or television. 50 A.L.R.3d 1311.

Privileged nature of communications made in course of agreements or arbitration procedure provided for by collective bargaining agreement. 60 A.L.R.3d 1041.

Dictation to defendant's secretary, typist, or stenographer as publication. 62 A.L.R.3d 1207.

Privileged nature of statements or utterances by member of school board in course of official proceedings. 85 A.L.R.3d 1137.

Libel or slander: defamation by gestures or acts. 46 A.L.R.4th 403.

Defamation of class or group as actionable members. 52 A.L.R.4th 618.

Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure. 53 A.L.R.4th 231.

Libel or slander: defamation by statement made in jest. 57 A.L.R.4th 520.

Imputation of allegedly objectionable political or social beliefs or principles as defamation. 62 A.L.R.4th 314.

Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action. 62 A.L.R.4th 616.

18-4802. Punishment for libel. — Every person who wilfully, and with a malicious intent to injure another, publishes, or procures to be published, any libel, is punishable by fine not exceeding \$5000, or imprisonment in the county jail not exceeding six (6) months. [I.C., § 18-4802, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 126; R.S., R.C., & C.L., § 6738; C.S., § 8254; I.C.A., § 17-1502, was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4803. Truth may be proved — Malice — Jury to determine law and fact. — In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury has the right to determine the law and the fact. [I.C., § 18-4803, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 126; R.S., R.C., & C.L., § 6740; C.S., § 8256; I.C.A., § 17-1504, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Burden of Proof.

Where article is libelous per se, proof of publication makes a prima facie case. Prosecution is not required to prove the untruth of article or that same was published with bad faith, truth or good faith of the publication

being matter of defense. *State v. Sheridan*, 14 Idaho 222, 93 P. 656, 15 L.R.A. (n.s.) 497 (1908).

Collateral References. May actual malice which will defeat conditional privilege in libel or slander coexist with belief in truth of imputation? 18 A.L.R. 1160.

Publication of truth as defense to criminal prosecution for libel. 19 A.L.R. 1477.

Relative provinces of court and jury as to privileged occasion and privileged communication in law of libel and slander. 26 A.L.R. 830.

18-4804. Malice presumed. — An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown. [I.C., § 18-4804, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6739; C.S., § 8255; I.C.A., § 17-1503, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. See notes, § 18-4801; under heading "Civil Act for Libel": *Browder v. Cook*, 59 F. Supp. 225 (N.D. Idaho 1944).

Privilege in Judicial Proceeding.

Whatever litigant may properly plead he may plead with or without malice, and in such case intent with which he pleaded same can not be inquired into or become an issue in action for libel. *Carpenter v. Grimes Pass Placer Mining Co.*, 19 Idaho 384, 114 P. 42 (1911).

18-4805. Sufficiency of publication. — To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself. [I.C., § 18-4805, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6741; C.S., § 8257; I.C.A., § 17-1505, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Dictation of defamatory matter as publication. 166 A.L.R. 117.

18-4806. Liability of authors, editors and proprietors. — Each author, editor and proprietor of any book, newspaper or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial. [I.C., § 18-4806, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6742; C.S., § 8258; I.C.A., § 17-1506, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Communications between different offices of corporation. 5 A.L.R. 455.

Libel by newspaper headlines. 95 A.L.R.3d 660.

18-4807. Report of public proceeding. — No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication. [I.C., § 18-4807, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6743; C.S., § 8259; I.C.A., § 17-1507, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

ANALYSIS

Judicial proceedings.
Newspaper account.
Opinion not privileged.
Public officer.

Judicial Proceedings.

This section seems to indicate that there might be matters contained in reports of judicial proceedings which, if published out of court, or by persons other than parties to actions, might be libelous, which would not be libelous when used by litigants in course of judicial proceedings. *Carpenter v. Grimes Pass Placer Mining Co.*, 19 Idaho 384, 114 P. 42 (1911).

Newspaper Account.

A newspaper is entitled to publish an account of actions taken by public officials without subjecting itself to libel. *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 249 P.2d 192 (1952).

News article by newspaper describing activities of individual commissioners in public meeting concerned with proposed budget in which it was stated that certain commissioners walked out of meeting was not libelous. *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 249 P.2d 192 (1952).

Newspapers had a conditional privilege to publish with accuracy the proceedings of a public gathering called for the purpose of inducing a district judge to call a grand jury. *Borg v. Boas*, 231 F.2d 788 (9th Cir. 1956).

Opinion Not Privileged.

An article which gives the opinion of a reporter as to proceedings of judicial, legisla-

tive, or other public official body, is not privileged under this section. *State v. Sheridan*, 14 Idaho 222, 93 P. 656, 15 L.R.A. (n.s.) 497 (1908).

Public Officer.

A newspaper article regarding activities of a postmaster in checking attendance of certain motion picture theatres was not a privileged or quasi privileged communication under either the common law rule or this statute. *Browder v. Cook*, 59 F. Supp. 225 (D. Idaho 1944).

Collateral References. Privilege of statement or communication by official charged with prosecution or detection of crime. 15 A.L.R. 249.

Criminal responsibility for libel of officer. 19 A.L.R. 1489.

Privilege of criminal libel in connection with court proceedings. 19 A.L.R. 1497.

Libel by recall petition. 43 A.L.R. 1268.

Proceedings to obtain search warrant as judicial proceeding within rule of privilege in libel and slander. 58 A.L.R. 723.

Libel and slander: Statements in nature of comment upon judicial, legislative, or administrative proceeding, or the decision therein, as within privilege accorded to proceeding or report thereof. 155 A.L.R. 1356.

Lack of jurisdiction as destroying privilege of defamatory allegations or statements in judicial proceedings. 158 A.L.R. 592.

Findings of judge or person acting in judicial capacity as privileged within law of libel. 42 A.L.R.2d 825.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Libel and slander: Reports of pleadings as within privilege for reports of judicial proceedings. 20 A.L.R.4th 576.

18-4808. Limitation on privilege in reporting public proceedings. — Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected. [I.C., § 18-4808, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6744; C.S., § 8260; I.C.A., § 17-1508, was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4809. Threats to publish libel — Extortion. — Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort any money or other valuable consideration from any person, is guilty of a misdemeanor. [I.C., § 18-4809, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6745; C.S., § 8261; I.C.A., § 17-1509, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Cross ref. Extortion, §§ 18-2401 — 18-2409.

Penalty for misdemeanor when not otherwise provided, § 18-113.

CHAPTER 49

LOTTERIES

SECTION.

- 18-4901. Lottery defined.
- 18-4902. Engaging in lottery.
- 18-4903. Traffic in lottery tickets.
- 18-4904. Assisting in lottery.
- 18-4905. Maintaining lottery office.

SECTION.

- 18-4906. Lottery insurance.
- 18-4907. Search, seizure, and confiscation.
- 18-4908. Permitting premises to be used for lottery.
- 18-4909. Exceptions.

18-4901. Lottery defined. — A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. The pari-mutuel system used in racing shall not constitute a lottery, so long as it is conducted in conformity with the provisions of chapter 25, title 54, Idaho Code. [I.C., § 18-4901, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 12, p. 1102; am. 1987, ch. 316, § 6, p. 660.]

Compiler’s notes. Initiative Measure No. 1 which provided for a state lottery, §§ 63-2601 — 63-2626 and which repealed §§ 18-4901 — 18-4909, was approved by the voters at the November 4, 1986 General Election by a vote of 226,816 to 151,132 and on November 17, 1986 the Governor signed a proclamation declaring it to be in full force and effect. However, prior to 1988 the Idaho Constitution Article 3, § 20 prohibited a lottery. In 1988 Article 3, § 20 was amended to permit a state lottery (S.L. 1987, p. 801, H.J.R. No. 3, ratified November 8, 1988). S.L. 1988, ch. 233

which became effective upon the adoption of H.J.R. No. 3, S.L. 1987, p. 801, November 8, 1988, repealed Chapter 26 of Title 63 (§§ 63-2601 — 63-2626) and enacted the present Idaho State Lottery Law, §§ 67-7401 — 67-7452. Section 67-7447 provides that “Chapters 38 and 49 of Title 18, Idaho Code, shall not apply to the tickets or shares of the state lottery established in this chapter” (67-7401 — 67-7452).

A former section, which comprised S.L. 1911, ch. 147, § 1, p. 451; reen. C.L., § 6859; C.S., § 8316; I.C.A., § 17-2401, was repealed

by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 13 of S.L. 1972, ch. 381 repealed § 18-6203, Idaho Code.

Sections 11 and 14 of S.L. 1972, ch. 381 are compiled herein as §§ former 18-3801 and 18-6409, respectively.

Sections 5 and 7 of S.L. 1987, ch. 316 are compiled as §§ 54-2513 and 54-2509, respectively.

Sec. to sec. ref. This chapter is referred to in § 67-7447.

Cited in: *Braddock v. Family Fin. Corp.*, 95 Idaho 256, 506 P.2d 824 (1973).

ANALYSIS

Acts defined as lotteries.

Elements.

Pari-mutuel system.

Stolen slot machines.

Acts Defined as Lotteries.

Acts 1947, ch. 151 declaring coin operated devices as gaming devices but not lotteries, Acts 1947, ch. 239 defining punchboards, chance spindles, and chance prize games violate Const., Art. 3, § 20 since devices described in designated acts are lotteries. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953).

Lotteries have been defined as a species of gambling wherein prizes are distributed by chance among persons paying a consideration for the chance to win; a game of hazard in which sums are paid for the chance to obtain a larger value in money or articles. *Oneida County Fair Bd. v. Smylie*, 86 Idaho 341, 386 P.2d 374 (1963).

Elements.

A scheme is a lottery if elements of chance, consideration, and prize are all present. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953).

Pari-mutuel System.

A pari-mutuel system used in a horse racing meet is not a lottery, as the pari-mutuel

system is not one solely based on chance, which constitutes an essential requisite of a lottery. *Oneida County Fair Bd. v. Smylie*, 86 Idaho 341, 386 P.2d 374 (1963).

Stolen Slot Machines.

Value of slot machines taken by defendant in burglary was immaterial as far as his guilt of crime of burglary was concerned, since the burglary was shown by the breaking and entering, and the fact that the slot machines could only be used for an illegal purpose had nothing to do with the offense charged. *State v. Johnson*, 77 Idaho 1, 287 P.2d 425, cert. denied, 350 U.S. 1007, 76 S. Ct. 649, 100 L. Ed. 869 (1956).

Collateral References. 38 Am. Jur. 2d, Gambling, §§ 5 — 10, 61 — 95.

54 C.J.S., Lotteries, § 1 et seq.

Loan or investment association as a lottery. 28 A.L.R. 1311.

What transactions are within the purview of statutes or ordinances in relation to gifts or prizes or gift enterprises. 39 A.L.R. 1035.

Scheme by which award depends upon votes as a lottery. 41 A.L.R. 1484.

Scheme for advertising or stimulating legitimate business as a lottery. 57 A.L.R. 424; 103 A.L.R. 866; 109 A.L.R. 709; 113 A.L.R. 1121.

Game of chance, lottery as. 135 A.L.R. 168.

Punchboard as a lottery. 163 A.L.R. 1279.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises where such activities took place. 19 A.L.R.2d 1228.

Entrapment to commit offense with respect to gambling or lotteries. 31 A.L.R.2d 1212.

Validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts. 17 A.L.R.3d 491.

Constitutionality, construction, and application of statute exempting scheme for benefit of public, religious, or charitable purposes from statutes or constitutional provisions against gambling. 42 A.L.R.3d 663.

18-4902. Engaging in lottery. — Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor. [I.C., § 18-4902, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 2, p. 451; reen. C.L., § 6859b; C.S., § 8318; I.C.A., § 17-2403, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4903. Traffic in lottery tickets. — Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument, purporting, or understood to be, or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor. [I.C., § 18-4903, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 3, p. 451; reen. C.L., § 6859c; C.S., § 8319; I.C.A., § 17-2404, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4904. Assisting in lottery. — Every person who aids or assists, either by printing, writing, publishing, or otherwise, in setting up, managing or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, or in advertising an illegal lottery, is guilty of a misdemeanor. [I.C., § 18-4904, as added by 1972, ch. 336, § 1, p. 844; am. 2000, ch. 370, § 1, p. 1224.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 4, p. 452; reen. C.L., § 6859d; C.S., § 8320; I.C.A., § 17-2405, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 2000, ch. 370 declared an emergency. Approved April 14, 2000.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4905. Maintaining lottery office. — Every person who opens, sets up, or keeps by himself or any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing or otherwise, advertises or publishes the setting up, opening or using of any such office, is guilty of a misdemeanor. [I.C., § 18-4905, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 5, p. 452; reen. C.L., § 6859e; C.S., § 8321; I.C.A., § 17-2406, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4906. Lottery insurance. — Every person who insures or receives consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn, or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to pay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not drawn, at any particular time, in any particular order, or who promises or agrees to pay any sum of money, or deliver any goods, things in action, or property, or forbear to do anything for the benefit of any

person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor. [I.C., § 18-4906, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 6, p. 452; reen. C.L., § 6859f; C.S., § 8322; I.C.A., § 17-2407, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4907. Search, seizure, and confiscation. — All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state. And whenever any judge or justice of the peace shall have knowledge or receive satisfactory information of the violation of any of the provisions of this chapter within his district or county, it shall be his duty forthwith to issue his warrant, directed to the sheriff or constable, to seize and bring before him such moneys and property offered for sale or distribution. And, upon the conviction of any person or persons for violation of any of the provisions of this chapter, any property so seized as above provided in this section, shall be sold by the sheriff or constable at public auction and the proceeds thereof paid over to the county treasurer of said county for the county school fund. [I.C., § 18-4907, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 7, p. 452; reen. C.L., § 6859h; C.S., § 8324; I.C.A., § 17-2409, was repealed by S.L. 1971, ch.

143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-4908. Permitting premises to be used for lottery. — Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor. [I.C., § 18-4908, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 8, p. 452; reen. C.L., § 6859g; C.S., § 8323; I.C.A., § 17-2408, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-4909. Exceptions. — The provisions of this chapter shall not apply to government land drawings, or to Carey act land drawings, or to the partitioning or division of real property and improvements thereon between joint owners or tenants in common by lot or any other method that such joint owners or tenants in common or their representative may agree upon. The provisions of this chapter shall not apply to advertising and promotional activities, whether or not conducted by mass media techniques, in which

prizes may be awarded. [I.C., § 18-4909, as added by 1972, ch. 336, § 1, p. 844; am. 1976, ch. 174, § 1, p. 636.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 147, § 9; p. 453; reen. C.L., § 6859a; C.S., § 8317; I.C.A., § 17-2402, was repealed by S.L. 1971, ch.

143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 restored the subject matter contained in the section as it existed prior to its repeal.

CHAPTER 50

MAYHEM

SECTION.

18-5001. Mayhem defined.

18-5002. Punishment for mayhem.

SECTION.

18-5003. Cannibalism defined — Punishment.

18-5001. Mayhem defined. — Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts out or disables the tongue, puts out an eye, slits the nose, ear or lip, is guilty of mayhem. [I.C., § 18-5001, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 43; R.S., R.C., & C.L., § 6577; C.S., § 6577; C.S., § 8222; I.C.A., § 17-1301, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Assault with intent to commit mayhem, § 18-907.

Juvenile charged with mayhem, when proceeded against as an adult, § 20-509.

Sec. to sec. ref. This section is referred to in §§ 18-310, 19-2520, 19-5307 and 19-5506.

Teeth.

At common law, to knock out unlawfully one's front tooth constituted "mayhem." Olson v. Union Pac. R.R., 62 Idaho 423, 112 P.2d 1005 (1941).

Collateral References. 53 Am. Jur. 2d, Mayhem and Related Offenses, § 1 et seq.

57 C.J.S., Mayhem, § 1 et seq.

Mayhem as dependent on part of body injured and extent of injury. 16 A.L.R. 955; 58 A.L.R. 1320.

Mayhem by use of poison or acid. 58 A.L.R. 1328.

Consent as defense to charge of mayhem. 86 A.L.R.2d 268.

18-5002. Punishment for mayhem. — Mayhem is punishable by imprisonment in the state prison not exceeding fourteen years. [I.C., § 18-5002, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 43; R.S., R.C., & C.L., § 6578; C.S., § 8223; I.C.A., § 17-1302, was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5003. Cannibalism defined — Punishment. — (1) Any person who wilfully ingests the flesh or blood of a human being is guilty of cannibalism.

(2) It shall be an affirmative defense to a violation of the provisions of this section that the action was taken under extreme life-threatening conditions as the only apparent means of survival.

(3) Cannibalism is punishable by imprisonment in the state prison not exceeding fourteen (14) years. [I.C., § 18-5003, as added by 1990, ch. 210, § 2, p. 467.]

Compiler's notes. Sections 1 and 3 of S.L. 1990, ch. 210 are compiled as §§ 18-1506A and 19-402, respectively. **Sec. to sec. ref.** This section is referred to in § 18-310.

CHAPTER 51

MILITARY PROPERTY

SECTION.

18-5101. [Repealed.]

18-5101. Selling military supplies of state. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-5101, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1.

CHAPTER 52

MONOPOLIES AND COMBINATIONS

SECTION.

18-5201. [Repealed.]

18-5201. Combinations in restraint of trade. [Repealed.]

Compiler's notes. Former § 18-5201, which comprised I.C., § 18-5201, as added by 1972, ch. 336, § 1, p. 844., was repealed by S.L. 2000, ch. 148, § 2, effective July 1, 2000. 1909, p. 297, §§ 1-3; reen. C.L., § 7129; C.S., § 8512; I.C.A., § 17-4013 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

A former section, which comprised S.L.

CHAPTER 53

OPIUM SMOKING

SECTION.

18-5301 — 18-5303. [Repealed.]

18-5301 — 18-5303. Resorts for smoking and sale of opium — Purchasing opium for smoking — Frequenting resorts. [Repealed.]

Compiler's notes. Former chapter 53, which comprised I.C., §§ 18-5301 — 18-5303 as added by S.L. 1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972. For present law see the Uniform Controlled Substances Act, §§ 37-2701 — 37-2751.

CHAPTER 54

PERJURY AND SUBORNATION OF PERJURY

SECTION.

18-5401. Perjury defined.

18-5402. Oath defined.

18-5403. Oath of office — Portion relating to future duties not included.

18-5404. Irregularity in administering oath no defense.

SECTION.

18-5405. Incompetency of witness no defense.

18-5406. Ignorance of materiality no defense.

18-5407. Deposition, when complete.

18-5408. Unqualified statement of unknown fact.

SECTION.

- 18-5409. Punishment for perjury.
- 18-5410. Subornation of perjury.
- 18-5411. Perjury resulting in execution of innocent person.
- 18-5412. Defendant's testimony may be used to prove perjury.

SECTION.

- 18-5413. Providing false information to law enforcement officers, government agencies, or specified professionals.
- 18-5414. Intentionally making false statements.

18-5401. Perjury defined. — Every person who, having taken an oath that he will testify, declare, depose, or certify truly, before any competent tribunal, legislative committee, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury. [I.C., § 18-5401, as added by 1972, ch. 336, § 1, p. 844; am. 1995, ch. 232, § 5, p. 787.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6478; C.S., § 8160; I.C.A., § 17-906 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sections 4 and 6 of S.L. 1995, ch. 232 are compiled as §§ 67-410 and 67-411A, respectively.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Section 7 of S.L. 1995, ch. 232 declared an emergency. Approved March 20, 1995.

Cross ref. Electoral qualifications, swearing falsely as to, after challenge, § 18-2302.

Informer in bribery cases may be prosecuted for perjury, § 48-1308.

Punishment for perjury, § 18-5409.

Voters, swearing falsely as to electoral qualifications after challenge, § 18-2302.

See subdivision "perjury" in table of cross references to penal provisions in other volumes at the end of this volume.

Sec. to sec. ref. This chapter is referred to in §§ 19-2716, 67-411A.

This section is referred to in §§ 18-5403, 18-7803 and 63-703.

ANALYSIS

- Consolidated actions.
- Material matter.
- Subornation of perjury.
- Sufficiency of indictment.

Consolidated Actions.

Where, at the beginning of a civil contempt proceeding based on the defendant father's failure to pay child support, the magistrate made it clear that he was going to treat a companion reciprocal action as being consolidated with the contempt action, and the defendant father failed to object to the consolidation, the father continued to be answerable

for the oath that he gave during the contempt proceeding; thus, the father's conviction of perjury based upon an untruthful answer that he gave in the reciprocal action was valid even though the oath was not readministered to him prior to his testifying in the reciprocal action. *State v. Aguilar*, 103 Idaho 578, 651 P.2d 512 (1982).

Material Matter.

Statements made in an examination under oath of a defendant in a presentence hearing after a plea of guilty are "material matters." *State v. Martinez*, 89 Idaho 232, 404 P.2d 573 (1965).

That defendant was in Payette, Idaho, on July 4, and not in Ft. Worth, Texas, as he had testified, was material to the issue of his guilt at his lewd conduct trial, even though Payette was still miles away from the location of the alleged crime. *State v. McBride*, 123 Idaho 263, 846 P.2d 914 (Ct. App. 1993).

A false statement usually will support a charge of perjury if it is material to any proper point of inquiry, and if it is calculated and intended to bolster the witness' testimony on some material point or to support or attack his credibility. *State v. McBride*, 123 Idaho 263, 846 P.2d 914 (Ct. App. 1993).

Subornation of Perjury.

The offense of suborning perjury is comprised of a corrupt agreement to testify falsely, followed by the willful giving of material testimony which the witness and procurer know to be false; thus, attempted subornation couples an intent to procure material and false testimony with the act of soliciting an agreement to testify falsely, although such testimony ultimately is not given. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Sufficiency of Indictment.

Indictment for perjury which states that defendant on his oath "falsely, wickedly, and

feloniously did say, swear, etc." is sufficient without the word "knowingly." *Territory v. Anderson*, 2 Idaho (Hasb.) 573, 21 P. 417 (1911).

Collateral References. 60A Am. Jur. 2d, Perjury, § 1 et seq.

70 C.J.S., Perjury, § 1 et seq.

Fear or compulsion, false statement made under, as perjury. 4 A.L.R. 1319.

Aliens, perjury as ground for collateral attack on order admitting to citizenship. 6 A.L.R. 410.

Perjury in verifying pleadings. 7 A.L.R. 1283.

Attorneys, commission of perjury as ground for disbarment or suspension of. 9 A.L.R. 200; 43 A.L.R. 110.

Privilege against self-incrimination as affecting admissibility in prosecution for perjury of testimony given before grand jury. 27 A.L.R. 151.

Entrapment to commit offense. 66 A.L.R. 508; 86 A.L.R. 263.

Evidence, admissibility in prosecution for perjury of judgment in civil case. 87 A.L.R. 1267.

Marriage license, perjury as predicated upon statements upon application for. 101 A.L.R. 1263.

Administrative requirement, oath taken in pursuance of, as predicate for criminal offense of perjury. 108 A.L.R. 1240.

Procuring perjury as contempt. 29 A.L.R. 2d 1157.

Materiality of testimony assigned as perjury as questioned for court or jury. 62 A.L.R. 2d 227.

Subornation of perjury prosecution: Admissibility of evidence of alleged perjurer's plea of guilty to charge of perjury. 63 A.L.R. 2d 825.

Correction of false testimony, effect of, or of attempt to make. 64 A.L.R. 2d 276.

Recantation as defense in perjury prosecution. 64 A.L.R. 2d 276.

Statement of belief or opinion as perjury. 66 A.L.R. 2d 791.

Circumstantial evidence, conviction of perjury where one or more of elements is established solely by. 88 A.L.R. 2d 852.

Perjury or false swearing as contempt. 89 A.L.R. 2d 1258.

Actionability of conspiracy to give or to procure false testimony or other evidence. 31 A.L.R. 3d 1423.

Invalidity of statute, or ordinance giving rise to proceedings in which false testimony was received as defense for prosecution for perjury. 34 A.L.R. 3d 413.

Offense of perjury as affected by question relating to jurisdiction of court before which testimony was given. 36 A.L.R. 3d 1038.

Incomplete, misleading, or unresponsive but literally true statement is perjury. 69 A.L.R. 3d 993.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance under state law. 22 A.L.R. 4th 366.

18-5402. Oath defined. — The term "oath" as used in the last section includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated. [I.C., § 18-5402, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6479; C.S., § 8161; I.C.A., § 17-907 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Informal Oath Sufficient.

Testimony of deputy that after he had signed the complaint the justice asked him "if

that was the true facts as I knew it" and in answering that it was he felt in conscience he had taken on the obligation of the oath, was a sufficient compliance with the former statute even though there was no formal administration of the oath, the deputy not having raised his hand or taken a verbal oath to the truth of the statements made in the complaint. *State v. Parker*, 81 Idaho 51, 336 P.2d 318 (1959).

18-5403. Oath of office — Portion relating to future duties not included. — So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two (2) preceding sections. [I.C., § 18-5403, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6480; C.S.,

§ 8162; I.C.A., § 17-908 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5404. Irregularity in administering oath no defense. — It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. [I.C., § 18-5404, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6481; C.S., § 8163; I.C.A., § 17-909 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5405. Incompetency of witness no defense. — It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate. [I.C., § 18-5405, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6482; C.S., § 8164; I.C.A., § 17-910 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5406. Ignorance of materiality no defense. — It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding. [I.C., § 18-5406, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6483; C.S., § 8165; I.C.A., § 17-911 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5407. Deposition, when complete. — The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true. [I.C., § 18-5407, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6484; C.S., § 8166; I.C.A., § 17-912 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5408. Unqualified statement of unknown fact. — An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. [I.C., § 18-5408, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C. & C.L., § 6485; C.S., § 8167; I.C.A., § 17-913 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5409. Punishment for perjury. — Perjury is punishable by imprisonment in the state prison not less than one (1) or more than fourteen (14) years. [I.C., § 18-5409, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864; § 90; R.S., R.C., & C.L., § 6486; C.S., § 8168; I.C.A., 17-914 was repealed by S.L. 1971, ch. 143, § 5, effective

Jury Instructions.

A jury instruction which recited the language of this section did not create a conclusive presumption of criminal intent. *State v. McBride*, 123 Idaho 263, 846 P.2d 914 (Ct. App. 1993).

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5410. Subornation of perjury. — Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured. [I.C., § 18-5410, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6487; C.S., § 8169; I.C.A., § 17-915 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sec. to sec. ref. This section is referred to in § 18-7803.

ANALYSIS

Discontinuance of attempt.
Elements of offense.
Sufficiency of evidence.

Discontinuance of Attempt.

Where the evidence did not establish when, if ever, the subornation attempt actually was discontinued, the jury permissibly could have found that the defendant never withdrew his offer to pay whatever the witness wanted for favorable testimony, and discontinuing the attempt after it had been made and had failed would not take the case outside § 18-306, the general attempt statute. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Elements of Offense.

The offense of suborning perjury is comprised of a corrupt agreement to testify

falsely, followed by the willful giving of material testimony which the witness and procurer know to be false; thus, attempted subornation couples an intent to procure material and false testimony with the act of soliciting an agreement to testify falsely, although such testimony ultimately is not given. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Sufficiency of Evidence.

Where the evidence in a prosecution for attempted subornation of perjury showed that the defendant had called a witness in a pending felony case against him, had offered the witness a sum of money, and had instructed the witness on how to testify at the criminal trial, the defendant's actions constituted the perpetration of the crime of attempted subornation, not merely the preparation or solicitation of the crime. *State v. Gibson*, 106 Idaho 491, 681 P.2d 1 (Ct. App. 1984).

Collateral References. Entrapment as defense to prosecution for attempted subornation of perjury. 18 A.L.R. 191.

18-5411. Perjury resulting in execution of innocent person. — Every person who, by wilful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death. [I.C., § 18-5411, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 90; R.S., R.C., & C.L., § 6488; C.S., § 8170; I.C.A., § 17-916 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5412. Defendant's testimony may be used to prove perjury. — The various sections of this code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination. [I.C., § 18-5412, as added by 1994, ch. 167, § 2, p. 374.]

Compiler's notes. Section 1 of S.L. 1994, ch. 167 contained repeals and § 3 is compiled as § 18-6405.

18-5413. Providing false information to law enforcement officers, government agencies, or specified professionals. — (1) A person is guilty of a misdemeanor if he knowingly gives or causes to be given false information to any law enforcement officer, any state or local government agency or personnel, or to any person licensed in this state to practice social work, psychology or counseling, concerning the commission of an offense, knowing that the offense did not occur or knowing that he has no information relating to the offense or danger.

(2) A person is guilty of a misdemeanor if he knowingly gives or causes to be given false information regarding his or another's identity to any law enforcement officer investigating the commission of an offense. [I.C., § 18-5413, as added by 1995, ch. 275, § 2, p. 923; am. 1998, ch. 425, § 1, p. 1342.]

Compiler's notes. Section 1 of S.L. 1995, ch. 275 is compiled as § 32-717C.

18-5414. Intentionally making false statements. — A person is guilty of a misdemeanor if he willfully and intentionally gives or causes to be given false information to any court, court personnel, court clerk or any state or local government agency or personnel in the application or request for a domestic violence protective order pursuant to chapter 63, title 39, Idaho Code. [I.C., § 18-5414, as added by 1996, ch. 173, § 1, p. 557.]

CHAPTER 55

POISONINGS — DENATURED ALCOHOL

SECTION.

18-5501. Poisoning food, medicine or wells.
18-5502. Denatured alcohol — Regulation of sale and transfer.

SECTION.

18-5503. Punishment for violation of preceding section.

18-5501. Poisoning food, medicine or wells. — Every person who wilfully mingles any poison with any food, drink or medicine, with intent that the same shall be taken by any human being, to his injury, and every

person who wilfully poisons any spring, well, or reservoir of water, is punishable by imprisonment in the state prison for a term of not less than one (1) nor more than ten (10) years. [I.C., § 18-5501, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 56; R.S., R.C., & C.L., § 6861; I.C.A., § 17-2002 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Administering poison with intent to kill, § 18-4014.

Sec. to sec. ref. This section is referred to in §§ 18-7803, 18-7905 and 19-5307.

Evidence.

Poison record of drug store is admissible after identification of accused, to show that he made purchase on certain day. *State v. Healey*, 45 Idaho 73, 260 P. 694 (1927).

State chemist with fifteen years' experience who has made analysis of bottle is competent witness as to its contents. *State v. Healey*, 45 Idaho 73, 260 P. 694 (1927).

Collateral References. 72 C.J.S., Poisons, § 1 et seq.

Seller of article not inherently dangerous as liable for poisoning of buyer. 13 A.L.R. 1176; 74 A.L.R. 343; 168 A.L.R. 1054.

Hospital's liability for injuries to, or death of, patient from poison. 22 A.L.R. 352; 39 A.L.R. 1431; 124 A.L.R. 186.

Physician's competency to testify as expert concerning effect of poison in food. 47 A.L.R. 150.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales. 40 A.L.R.2d 817.

Entrapment to commit offense against laws regulating sales of liquor. 55 A.L.R.2d 1322.

Qualifications of chemist or chemical engineer to testify as to effect of poison upon human body. 70 A.L.R.2d 1029.

Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 A.L.R.3d 589.

Liability for injury caused by spraying or dusting of crops. 37 A.L.R.3d 833.

18-5502. Denatured alcohol — Regulation of sale and transfer. —

Denatured alcohol may be sold, given away, or transferred, in this state by any registered pharmacists, or other person. It shall be unlawful for any person to sell, give away, or transfer, denatured alcohol, preparations or compounds thereof, in any quantity, unless the container from which such denatured alcohol, preparation or compound thereof, is taken and the container in which it is delivered to the purchaser or transferee, has thereon printed in red ink the words "Denatured Alcohol," "Caution," "Poison," the name and address of the vendor or transferor, the percentage strength of grain alcohol in the contents of the container, the names of at least two readily obtainable antidotes, and the words "must not be used externally or internally," and the following caution as required by the United States government:

"Completely denatured alcohol is a violent poison. It can not be applied externally to human or animal tissue without seriously injurious results. It can not be taken internally without inducing blindness and general physical decay, ultimately resulting in death."

Provided nothing herein contained shall prohibit the transfer of denatured alcohol, preparation or compound thereof, direct from a container, labeled as above provided, to the radiator of any motor vehicle for anti-freeze purposes. [I.C., § 18-5502, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1925, ch. 11, § 1, p. 12; I.C.A.,

§ 18-501 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5503. Punishment for violation of preceding section. — Any person or persons violating any of the provisions of this act shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment in the county jail not exceeding six months (6), or by both such fine and imprisonment. [I.C., § 18-5503, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1925, ch. 11, § 2, p. 12; I.C.A., § 18-502 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

CHAPTER 56

PROSTITUTION

SECTION.

- 18-5601. Interstate trafficking in prostitution.
- 18-5602. Procurement — Definition and penalty.
- 18-5603. Receiving pay for procurement.
- 18-5604. Paying for procurement.
- 18-5605. Detention for prostitution.
- 18-5606. Accepting earnings of prostitute.
- 18-5607. [Repealed.]
- 18-5608. Harboring prostitutes.

SECTION.

- 18-5609. Inducing person under eighteen years of age into prostitution — Penalties.
- 18-5610. [Repealed.]
- 18-5611. Inducing person under eighteen years of age to patronize a prostitute — Penalties.
- 18-5612. [Repealed.]
- 18-5613. Prostitution.
- 18-5614. Patronizing a prostitute.

18-5601. Interstate trafficking in prostitution. — Any person who imports persons into this state, or who exports persons from this state, for the purpose of prostitution, or any person who induces, entices or procures such activity, shall be guilty of a felony punishable by imprisonment for a period of not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000), nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5601, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 1, p. 672; am. 1994, ch. 130, § 1, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, § 1, p. 673; reen. C.L., § 6773; C.S., § 8270; I.C.A., § 17-1701 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Kidnapping, § 18-4501 et seq.

Sec. to sec. ref. Sections 18-5601 — 18-5610 are referred to in § 18-7803.

This section is referred to in § 33-1208.

Collateral References. 63A Am. Jur. 2d, Prostitution, § 1 et seq.

73 C.J.S., Prostitution, § 1 et seq.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignment — modern cases. 77 A.L.R.3d 519.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged. 5 A.L.R.4th 1128.

Entrapment defense in sex prosecutions. 12 A.L.R.4th 413.

Validity, construction, and application of

state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts or the like. 41 A.L.R.4th 675.

18-5602. Procurement — Definition and penalty. — Any person who induces, compels, entices, or procures another person to engage in acts as a prostitute shall be guilty of a felony punishable by imprisonment for a period of not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000) nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5602, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 2, p. 672; am. 1994, ch. 130, § 2, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, §§ 2, 3, p. 673; reen. C.L., § 6774; C.S., § 8271; I.C.A., § 17-1702 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Fong Wee*, 47 Idaho 416, 275 P. 1112 (1929); *State v. Clark*, 102 Idaho 693, 638 P.2d 890 (1981).

ANALYSIS

Consent of woman.

Corroboration.

Information.

Intent.

Moral turpitude.

Sentence.

Consent of Woman.

This section is not limited to acts against the will or consent of woman, since voluntary as well as involuntary acts are defined in the section and coercion and intimidation are not necessary to render accused guilty. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Corroboration.

Corroboration is not required for conviction under this section when the victim is married and over the age of 18 years. *State v. Rassmussen*, 92 Idaho 731, 449 P.2d 837 (1969).

Information.

All that is necessary under this section is that information is sufficient to inform defen-

dant of nature of charge against him and description of offense with such particularity as will serve to shield accused in case of second prosecution for same offense. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Intent.

It is intent with which woman is induced, enticed, or procured to enter house of prostitution which is gravamen of crime. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Moral Turpitude.

Violation of this section as showing lack of good moral character necessary to entitle person to license to practice law. *In re Dampier*, 46 Idaho 195, 267 P. 452 (1928); *In re Downs*, 46 Idaho 464, 268 P. 17 (1928).

Sentence.

Where a defendant was convicted on one count of inducing a woman for the purpose of prostitution and on five counts of accepting the earnings of a prostitute, and he was sentenced to indeterminate periods of up to three years on each of the six counts, to run concurrently, the trial court did not abuse its discretion since the sentence fell well within the statutory maximum of 20 years' confinement for each offense, and the general rule is that if a sentence is within the limits prescribed by statute, it will not be disturbed unless the defendant affirmatively shows a "clear abuse" of discretion. *State v. Wolf*, 102 Idaho 789, 640 P.2d 1190 (Ct. App. 1982).

18-5603. Receiving pay for procurement. — Any person who knowingly receives money or any object of value to procure a prostitute shall be guilty of a felony punishable by imprisonment for a period of not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000) nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5603, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 3, p. 672; am. 1994, ch. 130, § 3, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, §§ 4, 6, p. 673; C.L., § 6775; C.S., § 8272; I.C.A., § 17-1703 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: State v. Clark, 102 Idaho 693, 638 P.2d 890 (1981).

18-5604. Paying for procurement. — Any person who pays another money or any object of value to procure a third person to engage in prostitution shall be guilty of a felony punishable by imprisonment for not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000) nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5604, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 4, p. 672; am. 1994, ch. 130, § 4, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, § 5, p. 673; reen. C.L., § 6776; C.S., § 8273; I.C.A., § 17-1704 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5605. Detention for prostitution. — Anyone who holds, detains, or restrains, or who attempts to hold, detain or restrain another person for the purpose of compelling such person to engage in prostitution shall be guilty of a felony punishable by imprisonment for not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000) nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5605, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 5, p. 672; am. 1994, ch. 130, § 5, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, § 7, p. 673; reen. C.L., § 6777; C.S., § 8274; I.C.A., § 17-1705 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5606. Accepting earnings of prostitute. — (1) Any person who shall knowingly accept or appropriate any money or item of value from the proceeds or earnings of any person engaged in prostitution as part of a joint venture with such person shall be guilty of a felony punishable by imprisonment for a period of not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000) nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment.

(2) As defined in this section "joint venture" is an undertaking by two (2) or more persons jointly to carry out a single business enterprise involving one or more transactions for profit. Such joint venture can be created by oral agreement or may be inferred from acts or conduct. [I.C., § 18-5606, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 6, p. 672; am. 1994, ch. 130, § 6, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, § 8, p. 673;

reen. C.L., § 6778; C.S., § 8275; I.C.A., § 17-1706 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

ANALYSIS

Consideration.

Validity of sentence.

Consideration.

The term "consideration" used in this section prior to the 1981 amendment was not meant to include services which were intended to keep a woman in the business of prostitution and which were proscribed as felonious procurement by the legislature; accordingly, where the defendant maintained an advertised place of business equipped with a telephone from which to dispatch prostitutes, maintained files and screened potential customers and provided any necessary legal defense for the prostitutes, he could not argue that he knowingly accepted earnings of the prostitutes as consideration for his services,

which would except him from the "without consideration" language formerly contained in this section. *State v. Clark*, 102 Idaho 693, 638 P.2d 890 (1981) (decision prior to 1981 amendment).

Validity of Sentence.

Where a defendant was convicted on one count of inducing a woman for the purpose of prostitution and on five counts of accepting the earnings of a prostitute, and he was sentenced to indeterminate periods of up to three years on each of the six counts, to run concurrently, the trial court did not abuse its discretion since the sentence fell well within the statutory maximum of 20 years' confinement for each offense, and the general rule is that if a sentence is within the limits prescribed by statute, it will not be disturbed unless the defendant affirmatively shows a "clear abuse" of discretion. *State v. Wolf*, 102 Idaho 789, 640 P.2d 1190 (Ct. App. 1982).

18-5607. Living with, or on earnings of prostitute. [Repealed.]

Compiler's notes. Former § 18-5607, which comprised I.C., § 18-5607, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 7, p. 672, was repealed by S.L. 1994, ch. 130, § 7, effective July 1, 1994.

Another former § 18-5607, which comprised S.L. 1911, ch. 205, § 9, p. 673; compiled and reen. C.L., § 6779; C.S., § 8276; I.C.A., § 17-1707 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5608. Harboring prostitutes. — Any person maintaining, controlling or supporting a house of prostitution as defined in this chapter, shall be guilty of a felony punishable by imprisonment for not less than two (2) years nor more than twenty (20) years, or by a fine of not less than one thousand dollars (\$1,000) nor more than fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5608, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 8, p. 672; am. 1994, ch. 130, § 8, p. 291.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 205, § 10, p. 673; reen. C.L., § 6780; C.S., § 8277; I.C.A., § 17-1708 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5609. Inducing person under eighteen years of age into prostitution — Penalties. — Every person who induces or attempts to induce a person under the age of eighteen (18) years to engage in prostitution shall be guilty of a felony punishable by imprisonment in the state penitentiary for a period of not less than two (2) years, which may be extended to life imprisonment, or by a fine not exceeding fifty thousand dollars (\$50,000), or by both such fine and imprisonment. [I.C., § 18-5609, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 9, p. 672; am. 1994, ch. 130, § 9, p. 291.]

Compiler's notes. A former section, which comprised R.S., R.C. & C.L., § 6770; C.S.,

§ 8267; I.C.A., § 17-1606 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Interstate trafficking in prostitution, §§ 18-5601 — 18-5608.

ANALYSIS

Corroboration.
Seduction.

Corroboration.

This section must be construed with § 19-2115 and in a prosecution under this section the testimony of the prosecutrix must be corroborated under the requirements of § 19-2115. *State v. Rassmussen*, 92 Idaho 731, 449 P.2d 837 (1969).

Seduction.

The rule applied in criminal case that

woman seduced must have been previously chaste is inapplicable in civil action for damages. *Kralick v. Shuttleworth*, 49 Idaho 424, 289 P. 74 (1930).

Collateral References. Exhibition of child in prosecution for seduction. 1 A.L.R. 622.

Reduction of appellate court of punishment imposed by trial court. 29 A.L.R. 331; 89 A.L.R. 295.

For general discussion. 74 A.L.R. 311.

Forgiveness or compromise as defense to prosecution for seduction. 80 A.L.R. 833.

Offer of marriage as defense to prosecution for seduction. 80 A.L.R. 845.

Valid marriage between prosecutrix and defendant, facts preventing, as defense. 85 A.L.R. 123.

18-5610. Abduction of person under eighteen years of age for prostitution — Penalties. [Repealed.]

Compiler's notes. Former § 18-5610, which comprised I.C., § 18-5610, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 324, § 10, p. 672, was repealed by S.L. 1994, ch. 130, § 10, effective July 1, 1994.

Another former § 18-5610, which comprised R.S., R.C., & C.L., § 6771; C.S., § 8268; I.C.A., 17-1607 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5611. Inducing person under eighteen years of age to patronize a prostitute — Penalties. — Any person who induces or attempts to induce a person under the age of eighteen (18) years to patronize a prostitute shall be guilty of a felony. [I.C., § 18-5611, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 130, § 11, p. 291.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6772; C.S., § 8269; I.C.A., § 17-1608 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the

section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. Constitutionality of pandering statutes. 74 A.L.R. 312.

18-5612. Disorderly houses — Penalty for keeping. [Repealed.]

Compiler's notes. Former § 18-5612, which comprised I.C., § 18-5612, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 130, § 12, effective July 1, 1994.

Another former § 18-5612, which comprised R.S., R.C., & C.L., § 6842; C.S., § 8305; I.C.A., § 17-2104 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5613. Prostitution. — (1) A person is guilty of prostitution when he or she: (a) engages in or offers or agrees to engage in sexual conduct, or sexual contact with another person in return for a fee; or (b) is an inmate of a house of prostitution; or (c) loiters in or within view of any public place for the purpose of being hired to engage in sexual conduct or sexual contact.

(2) Prostitution is a misdemeanor, provided, however, that on a third or subsequent conviction for prostitution, it shall be a felony.

(3) Definitions:

- (a) "Sexual conduct" means sexual intercourse or deviate sexual intercourse.
- (b) "Sexual contact" means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.
- (c) "House of prostitution" means a place where prostitution or promotion of prostitution is regularly carried on by one (1) or more persons under the control, management or supervision of another.
- (d) "Inmate" means a person who engages in prostitution in or through an agency of a house of prostitution.
- (e) "Public place" means any place to which the public or any substantial group thereof has access. [I.C., § 18-5613, as added by 1977, ch. 175, § 2, p. 450.]

Compiler's notes. Former § 18-5613 which comprised 1972, ch. 381, § 19, p. 1102; am. 1973, ch. 15, § 1, p. 31 was repealed by S.L. 1977, ch. 175, § 1.

Cross ref. Penalty for misdemeanor not otherwise provided, § 18-113.

Penalty for felony not otherwise specified, § 18-112.

DECISIONS UNDER PRIOR LAW

Definitions.

There is no longer in Idaho a traditional definition of prostitution since the former law regarding prostitution section clearly reflects a legislative attempt to redefine prostitution more expansively with application to male as well as female and to include a proscription against homosexual and other deviate con-

duct. *State v. Lopez*, 98 Idaho 581, 570 P.2d 259 (1976).

The former section concerning prostitution failed to use clear, unambiguous language to define the term "prostitution" and, consequently, was void for vagueness under Idaho Const., Art. I, § 13. *State v. Lopez*, 98 Idaho 581, 570 P.2d 259 (1976).

18-5614. Patronizing a prostitute. — (1) A person is guilty of patronizing a prostitute when he or she:

- (a) Pays or offers or agrees to pay another person a fee for the purpose of engaging in an act of sexual conduct or sexual contact;
- (b) Enters or remains in a house of prostitution for the purpose of engaging in sexual conduct or sexual contact.

(2) Patronizing a prostitute is a misdemeanor, provided that a third or subsequent conviction therefor shall be a felony. [I.C., § 18-5614, as added by 1977, ch. 175, § 3, p. 450; am. 1994, ch. 130, § 13, p. 291.]

Cross ref. Penalty for misdemeanor not otherwise provided, § 18-113.

CHAPTER 57

PUBLIC FUNDS AND SECURITIES

SECTION.

- 18-5701. Misuse of public money by officers.
- 18-5702. Failure to keep and pay over money.
- 18-5703. Public moneys defined.

SECTION.

- 18-5704. Failure of officer to account for fines or costs.

18-5701. Misuse of public money by officers. — Each officer of this state, or of any county, city, town or district of this state, and every other person charged with the receipt, safe keeping, transfer or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another; or,

2. Loans the same or any portion thereof; or, having the possession or control of any public money, makes a profit out of, or uses the same for any purpose not authorized by law; or,

3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

4. Deposits the same or any portion thereof in any bank, or with any banker or other person, otherwise than on special deposit, or as otherwise authorized by law; or,

5. Changes or converts any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law; or,

6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

7. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or,

8. Wilfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order or warrant drawn upon such moneys by competent authority; or,

9. Wilfully omits to transfer the same when such transfer is required by law; or,

10. Wilfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same;

Is punishable by imprisonment in the state prison for not less than one (1) nor more than ten (10) years, and is disqualified from holding any office in this state. [I.C., § 18-5701, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 70; R.S., § 6975; R.C., & C.L., § 6975; C.S., § 8379; I.C.A., § 17-3201 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Depositories for public funds, § 57-101 et seq.

State voucher, making of a false certificate on, a felony, §§ 18-2706, 67-2013.

See subdivision "public officers" in table of cross references to penal provisions in other volumes at the end of this volume.

Sec. to sec. ref. This section is referred to in § 18-5703.

Cited in: Bingham County v. Woodin, 6

Idaho 284, 55 P. 662 (1898); Blaine County v. Fuld, 31 Idaho 358, 171 P. 1138 (1918); City of Pocatello v. Fargo, 41 Idaho 432, 242 P. 297 (1925); State v. Smith, 48 Idaho 558, 283 P. 529 (1929); City of St. Anthony v. Mason, 49 Idaho 717, 291 P. 1067 (1930); Bannock County v. Citizens' Bank & Trust Co., 53 Idaho 159, 22 P.2d 674 (1933); Fidelity & Deposit Co. v. Mason, 55 Idaho 397, 42 P.2d 486 (1935); Independent Sch. Dist. No. 1 v. Diefendorf, 57 Idaho 191, 64 P.2d 393 (1937); State v. Taylor, 59 Idaho 724, 87 P.2d 454 (1939).

ANALYSIS

Auditor of state.

Construction.

Embezzlement.

Intent.

Liability of bank.

Treasurer of irrigation district.

Auditor of State.

State auditor in official capacity is not custodian of public moneys within meaning of this section. In re Huston, 27 Idaho 231, 147 P. 1064 (1915).

Construction.

The "public moneys" defined in § 18-5703 include all of the moneys which came into the hands of the defendant justice of the peace in his official capacity and § 31-3016 (repealed) required all fees and costs received by defendant in both civil and criminal cases to be transmitted to the county treasurer and § 19-4701 likewise required fines, forfeitures and costs to be remitted to the county treasurer. State v. Bell, 84 Idaho 153, 370 P.2d 508 (1962).

Embezzlement.

This section was intended for punishment of that particular class of public officers who, being charged with custody of public funds, embezzle same in violation of their trust. In re Huston, 27 Idaho 231, 147 P. 1064 (1915).

Act of highway district treasurer in leaving funds in bank, when he should have called and paid warrants with it, is an appropriation to his own use or use of another and for purpose not authorized by law and in violation of provisions of this section. Buhl Hwy. Dist. v. Allred, 41 Idaho 54, 238 P. 298 (1925).

Intent.

It is not necessary to establish guilt that there be any intent on part of defendant in making the prohibited deposit to cheat, wrong, or defraud county. State v. Browne, 4 Idaho 723, 44 P. 552 (1896).

This section does not hold public officer criminally responsible for an honest mistake in drawing warrants on public money. In re Huston, 27 Idaho 231, 147 P. 1064 (1915).

There was no conflict between the former section and former § 18-5704 and they were not inconsistent. The former section defined a felony and the word "wilfully" as used therein meant "knowingly" or "intentionally" and did not encompass inadvertence or mistake. Former § 18-5704 defined a misdemeanor and included cases of inadvertence and mistake. State v. Bell, 84 Idaho 153, 370 P.2d 508 (1962).

Liability of Bank.

Where money is deposited in bank generally by state treasurer in violation of this

section, the bank nevertheless receives the money on special deposit as a trust fund and can not commingle it with money of the bank, nor have its creditors any interest therein in case of insolvency of the bank. State v. Thum, 6 Idaho 323, 55 P. 858 (1898).

Subdivision 4 of this section was not repealed by the legislation commonly known as the state and county depository law. In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916).

Statutes of state as well as decisions of court become part of contract of special deposit at time same is made. Fidelity State Bank v. North Fork Hwy. Dist., 35 Idaho 797, 209 P. 449, 31 A.L.R. 781 (1922).

Both officer and bank hold public funds in trust; there is no authority to commingle such funds with general funds of bank, but deposit of these funds is special deposit under statute. Fidelity State Bank v. North Fork Hwy. Dist., 35 Idaho 797, 209 P. 449, 31 A.L.R. 781 (1922).

Mere fact that officer attempted to make general deposit and that bank undertook to treat it as such does not operate to change character of deposit. Fidelity State Bank v. North Fork Hwy. Dist., 35 Idaho 797, 209 P. 449, 31 A.L.R. 781 (1922).

Those agencies of the government not authorized by law to deposit their funds in a bank violate this section and a deposit made by them is a trust fund entitled to preference in the liquidation of the assets of the bank. Independent Sch. Dist. No. 1 v. Diefendorf, 57 Idaho 191, 64 P.2d 393 (1937).

Treasurer of Irrigation District.

A treasurer of an irrigation district is a "public officer," within the meaning of this section. In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916).

Moneys deposited by treasurer of irrigation district or other public official in a bank become a trust fund, not part of the estate of bank, and must be so treated in case of insolvency of bank. In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916); Fidelity State Bank v. North Fork Hwy. Dist., 35 Idaho 797, 209 P. 449, 31 A.L.R. 781 (1922).

Collateral References. 63A Am. Jur. 2d, Public Officers and Employees, § 1 et seq.

67 C.J.S., Officers, § 1 et seq.

Liability of public officer for interest or other earnings received on public money in his possession. 5 A.L.R.2d 257.

18-5702. Failure to keep and pay over money. — Every officer charged with the receipt, safe keeping or disbursement of public moneys who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony. [I.C., § 18-5702, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 71; R.S., R.C., & C.L., § 6976; C.S., § 8380; I.C.A., § 17-3202 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Cited in: *State v. Thum*, 6 Idaho 323, 55 P. 858 (1898); *In re Bank of Nampa, Ltd.*, 29 Idaho 166, 157 P. 1117 (1916); *Bannock County v. Citizens' Bank & Trust Co.*, 53 Idaho 159, 22 P.2d 674 (1933).

ANALYSIS

Intent.

Liability of public officials.

Warden of penitentiary.

Intent.

Those entrusted with the care and safekeeping of public funds are held to strict accountability for the safeguarding of same and in compliance with the statutes governing the same; to sustain a conviction in a criminal case more must be proven in connection with it than will justify recovery in a civil suit. *Bonneville County v. Standard Accident Ins. Co.*, 57 Idaho 657, 67 P.2d 904 (1937); *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

On the question of intent the jury should be instructed that the intent mentioned in § 18-114 is not an intent to commit a crime but is merely the intent to knowingly perform the interdicted act, or by criminal negligence the failure to perform the required act, herein the act of receiving either actually or constructively and the act of knowingly or through criminal negligence not turning over the money involved herein, or knowingly or through criminal negligence failing to see that the money, though only constructively and not actually in appellant's possession, was turned over to the state treasurer in compliance with the statute. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

In prosecutions under this section, there must be by § 18-114, what the legislature has declared an essential of every offense, "union or joint operation of act and intent," knowledge and intent to do the act (not necessarily

commit a crime or do wrong), or criminal negligence as above defined, and *State v. Browne*, 4 Idaho 723, 44 P. 552 (1896), though discussing an offense under the original of § 18-5701, and the later cases construing *State v. Browne*, supra, and others, make this clear. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

Liability of Public Officials.

A specific intent such as is necessary in embezzlement, larceny, making false report with intent to deceive, etc., is not an ingredient of an offense under section 18-5702 requiring officials to account for public moneys. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

Warden of Penitentiary.

The evidence on the part of the prosecution showed that while warden of the penitentiary, certain sums of money received from the sale of produce from the prison farm came into the hands of the chief clerk of the penitentiary and were never turned over to the state treasurer in compliance with § 59-1014, or otherwise. The state contended these were so in the warden's possession under § 20-306 (I.C.A. 1932, now repealed), that though there was no contention he had actual possession nor personally withheld the money or intended to profit by the transaction, he should have known of the derelictions of the chief clerk and was so criminally negligent in connection therewith as to be guilty under § 18-5702. The trial court refused admission of two bonds of the chief clerk of the penitentiary; one covering the period from February 6, 1933 to February 6, 1935, and the other period from February 6, 1935 to February 6, 1937. The latter bond covering the major portion of the time during which the alleged derelictions took place was pertinent and admissible as bearing on the degree of care appellant should have used under the duty imposed on him by § 20-306 (I.C.A. 1932, now repealed), in the care of the property and funds of the penitentiary, not as absolving appellant but to aid the jury in determining whether his conduct constituted criminal negligence as defined in *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937), and its rejection was prejudicial error. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

18-5703. Public moneys defined. — The phrase "public moneys" as used in the two preceding sections includes all bonds and evidences of indebtedness, and all moneys belonging to the state, or any city, county, town or district therein, and all moneys, bonds and evidences of indebtedness received or held by state, county, district, city or town officers in their official capacity. [I.C., § 18-5703, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 71; R.S., R.C., & C.L., § 6977; C.S., § 8381; I.C.A., § 17-3203 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: State v. Thum, 6 Idaho 323, 55 P. 858 (1898); Bannock County v. Citizens' Bank & Trust Co., 53 Idaho 159, 22 P.2d 674 (1933); Independent Sch. Dist. No. 1 v. Diefendorf, 57 Idaho 191, 64 P.2d 393 (1937).

ANALYSIS

Construction.

Irrigation districts.

Construction.

The "public moneys" referred to in § 18-

5701 include all of the moneys which came into the hands of the defendant justice of the peace in his official capacity and § 31-3016 (repealed) required all fees and costs received by defendant in both civil and criminal cases to be transmitted to the county treasurer and § 19-4701 likewise required fines, forfeitures and costs to be remitted to the county treasurer. State v. Bell, 84 Idaho 153, 370 P.2d 508 (1962).

Irrigation Districts.

Irrigation district is a public corporation, its treasurer is a public officer, and moneys of such district received by him as treasurer are public money. In re Bank of Nampa, Ltd., 29 Idaho 166, 157 P. 1117 (1916).

18-5704. Failure of officer to account for fines or costs. — If any clerk, justice of the peace, sheriff or constable who receives any fine or forfeiture or costs arising out of a judgment in a criminal action, refuses or neglects to pay over the same according to law, and within thirty (30) days after the receipt thereof, such officer is guilty of a misdemeanor. [I.C., § 18-5704, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 6978; 1899, p. 379, § 5; reen. R.C. & C.L., § 6978; C.S., § 8382; I.C.A., § 17-3204 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Disposition of fines and forfeitures, § 19-4705.

Construction of Section.

There was no conflict between former § 18-5701 and the former § 18-5704 and they were

not inconsistent; former § 18-5701 defined a felony and the word "wilfully" as used therein meant "knowingly" or "intentionally" and did not encompass inadvertence or mistake; former § 18-5704 defined a misdemeanor and included cases of inadvertence and mistake. State v. Bell, 84 Idaho 153, 370 P.2d 508 (1962).

Where justice of peace was charged with wilfully failing to pay over public moneys it was proper to prosecute him under former § 18-5701 since "public moneys" as defined in former § 18-5703 includes all public moneys coming into his hands. State v. Bell, 84 Idaho 153, 370 P.2d 508 (1962).

CHAPTER 58

PUBLIC HEALTH AND SAFETY

SECTION.

18-5801. Use of a life jacket or flotation device in a swimming pool.

18-5802. [Repealed.]

18-5803. Exposure of animal carcasses.

18-5804. Slaughter and sale of famished animals.

18-5805, 18-5806. [Repealed.]

18-5807. Leaving carcasses near highways, dwellings and streams, and pollution of water used for domestic purposes.

SECTION.

18-5808. Permitting mischievous animal at large.

18-5809. [Repealed.]

18-5810. Blind persons only may use white or red and white canes.

18-5811. Action required to avoid accident or injury to disabled person — Prohibited intentional actions — Penalties.

18-5811A. Unlawful use of assistance device or dog.

SECTION.
18-5812. Battery to disabled persons and assistance dogs — Penalties.
18-5812A. Disabled persons may be accompanied by assistance dogs — Penalty for intentional violation.
18-5812B. Person may be accompanied by an assistance dog-in-training — Liability.

SECTION.
18-5813 — 18-5815. [Repealed.]
18-5816. Abandonment of airtight containers without removing door locks prohibited.
18-5817. “Abandon” defined as leaving to attract children.
18-5818. Violations a misdemeanor.

18-5801. Use of a life jacket or flotation device in a swimming pool. — No person shall prohibit the use of a life jacket or other flotation device in a swimming pool by an individual who, as evidenced by a statement signed by a licensed physician, suffers from a physical disability or condition which necessitates the use of the life jacket or other flotation device. Any person violating the provisions of this section shall be guilty of a misdemeanor. [I.C., § 18-5801, as added by 1987, ch. 37, § 1, p. 60.]

Compiler’s notes. Former § 18-5801 which comprised R.S., R.C., & C.L., § 6913; C.S., § 8342; I.C.A., § 17-2704, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972 was reenacted as § 18-5801 by S.L. 1972, ch. 336, § 1, effective April 1, 1972 and repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-5802. Exposure of person with contagious disease. [Repealed.]

Compiler’s notes. Former § 18-5802, which comprised I.C., § 18-5802, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994. Another former § 18-5802, which comprised R.S., R.C., & C.L., § 6927; C.S., § 8353; I.C.A., § 17-2705 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5803. Exposure of animal carcasses. — Every person who puts the carcass of any dead animal, or the offal of any slaughter pen, corral or butcher shop, into any river, creek, pond, street, alley, public highway or road in common use, or who attempts to destroy the same by fire within one-fourth (¼) of a mile of any city, town or village, is guilty of a misdemeanor. [I.C., § 18-5803, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6914; C.S., § 8343; I.C.A., § 17-2706 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-5804. Slaughter and sale of famished animals. — Every person who slaughters, offers or exposes for sale to the public any animal or animals that have been confined for forty-eight (48) hours or more without proper food, or twenty (20) hours without water, is guilty of a misdemeanor. [I.C., § 18-5804, as added by 1972, ch. 336, § 1, p. 844.]

Compiler’s notes. A former section, which comprised R.S., R.C., & C.L., § 6920; C.S., § 8345; I.C.A., § 17-2707 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-5805, 18-5806. Sale of animal with glanders — Animal to be killed. [Repealed.]

Compiler's notes. Former § 18-5805, which comprised I.C., § 18-5805, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-5805, which comprised R.S., R.C., & C.L., § 6932; C.S., § 8359; I.C.A., § 17-2708 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Another former § 18-5806, which comprised R.S., R.C., & C.L., § 6933; C.S., § 8360; I.C.A., § 17-2709 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Former § 18-5805, which comprised I.C., § 18-5805, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

18-5807. Leaving carcasses near highways, dwellings and streams, and pollution of water used for domestic purposes. — Any person who shall knowingly leave the carcass of any animal within a quarter of a mile of any inhabited dwelling, or on, along or within a quarter of a mile of any public highway or stream of water, for a longer period than twenty-four hours, without burying the same, and by such exposure or burial within 200 feet of any stream, canal, ditch, flume, or other irrigation works shall pollute or contaminate, so as to render unfit for domestic use, any natural stream of water, or the water in any canal, ditch, flume, or other irrigation works, used by others for domestic purposes, shall be guilty of a misdemeanor, and upon conviction shall be fined any sum not to exceed \$100.00. [I.C., § 18-5807, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1905, p. 39, § 33; reen. R.C., & C.L., § 8361; C.S., § 8361; I.C.A., § 17-2710; S.L. 1937, ch. 143, § 1, p. 235 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5808. Permitting mischievous animal at large. — If the owner of a mischievous animal, knowing its propensities, wilfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions which circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony. [I.C., § 18-5808, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1905, p. 39, § 33; reen. R.C., & C.L., § 8361; C.S., § 8361; I.C.A., § 17-2710; S.L. 1937, ch. 143, § 1, p. 235 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-5809. Permitting explosion causing death. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-5809, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 319, § 1.

Another § 18-5809 which comprised R.S., R.C., & C.L., § 6908; C.S., § 8337; I.C.A., § 17-2713, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5810. Blind persons only may use white or red and white canes. — No person, except those wholly or partially blind, shall carry or use on any street, highway, or in any other public place a cane or walking stick which is white in color, or white tipped with red. [I.C., § 18-5810, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1937, ch. 46, § 1, p. 62 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5811. Action required to avoid accident or injury to disabled person — Prohibited intentional actions — Penalties. — (1) Any person, whether a pedestrian, operating a vehicle or otherwise, who approaches an individual appearing to be a disabled person or lawfully using an assistance device or assistance dog, and who:

(a) Intentionally fails to stop, change course, speak or take such other action as is necessary to avoid any accident or injury to the disabled person, the assistance device or dog, is guilty of a misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, or by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000), or by both.

(b) Intentionally startles or frightens such person's dog, is guilty of a misdemeanor, punishable by imprisonment in the county jail not exceeding six (6) months, or by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000), or by both.

(2) Any person who, without justification, intentionally interferes with the use of an assistance dog or assistance device by obstructing, battering or intimidating the user or the dog, is guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six (6) months, or by a fine of not less than fifty dollars (\$50.00) nor more than one thousand five hundred dollars (\$1,500), or by both. [I.C., § 18-5811, as added by 1997, ch. 267, § 2, p. 763.]

Compiler's notes. Former § 18-5811 which comprised I.C., § 18-5811, as added by 1972, ch. 336, § 1, p. 844; am. 1984, ch. 147, § 1, p. 342; am. 1992, ch. 58, § 1, p. 168 was repealed by S.L. 1997, ch. 267, § 1, effective July 1, 1997.

Another former § 18-5811 which comprised S.L. 1937, ch. 46, § 2, p. 62; am. S.L. 1965, ch.

151, § 1, p. 290, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Cross ref. Driver's duty toward blind with white cane, § 56-705.

Rights of blind and physically handicapped persons, §§ 56-701 — 56-707.

Sec. to sec. ref. This section is referred to in § 56-705.

18-5811A. Unlawful use of assistance device or dog. — Any person, not being a disabled person or being trained to assist disabled persons, who uses an assistance device or assistance dog in an attempt to gain treatment or benefits as a disabled person, is guilty of a misdemeanor. [I.C., § 18-5811A, as added by 1997, ch. 267, § 3, p. 763.]

Sec. to sec. ref. This section is referred to in § 56-705.

18-5812. Battery to disabled persons and assistance dogs — Penalties. — (1) Any person who:

(a) Permits any animal which is owned, harbored or controlled by him to cause injury to or the death of any assistance dog or dog-in-training, is guilty of a misdemeanor.

(b) Intentionally causes injury to or the death of any assistance dog or dog-in-training is guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding one (1) year, or by a fine not exceeding five thousand dollars (\$5,000), or by both.

(2) In addition to any other criminal or civil penalties provided for violation of this section, any person convicted under this section, regardless of the form of judgment, shall be ordered to make full restitution to the owner or custodian of such dog for all veterinary bills, replacement and other costs resulting from the injury or death of the dog. [I.C., § 18-5812, as added by 1997, ch. 267, § 5, p. 763.]

Compiler's notes. Former § 18-5812 which comprised I.C., § 18-5812, as added by 1972, ch. 336, § 1, p. 844; am. 1984, ch. 147, § 2, p. 342; am. 1992, ch. 58, § 2, p. 168 was repealed by S.L. 1997, ch. 267, § 4, effective July 1, 1997.

Another former § 18-5812 which comprised

S.L. 1937, ch. 46, § 3, p. 62; am. S.L. 1965, ch. 151, § 2, p. 290, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 56-705.

18-5812A. Disabled persons may be accompanied by assistance dogs — Penalty for intentional violation. — (1) A disabled person shall not be denied the use of any common carrier or public transportation facility or admittance to any hotel, motel, cafe, elevator, housing for sale or rent, or any other public place within the state of Idaho by reason of his being accompanied by an assistance dog. A disabled person shall be entitled to have an assistance dog with him in such places and while using such facilities without being required to pay any additional charges for his assistance dog, but shall be liable for any damage caused by his assistance dog.

(2) Any person, firm, association or corporation or agent of any person, firm, association or corporation intentionally violating the provisions of this section shall be guilty of a misdemeanor. [I.C., § 18-5812A, as added by 1972, ch. 336, § 1, p. 844; am. 1984, ch. 147, § 3, p. 342; am. 1992, ch. 58, § 3, p. 168; am. 1997, ch. 267, § 6, p. 763.]

Compiler's notes. A former section, which comprised I.C. § 18-5812A as added by S.L. 1965, ch. 151, § 3, p. 290 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 4 of S.L. 1984, ch. 147 is compiled as § 56-701.

Section 13 of S.L. 1984, ch. 147 declared an emergency. Approved March 31, 1984.

Cross ref. Blind persons' rights with guide dog, § 56-704.

Sec. to sec. ref. This section is referred to in § 56-705.

18-5812B. Person may be accompanied by an assistance dog-in-training — Liability. — (1) A person shall not be denied the use of any

common carrier or public transportation facility or admittance to any hotel, motel, cafe, elevator, or any other public place within the state of Idaho by reason of being accompanied by a dog-in-training. Such dog-in-training shall be properly leashed so that the person may maintain control of the dog.

(2) Access to public places for dogs-in-training may be temporarily denied if the dog is poorly groomed so as to create a health hazard or the person accompanying the dog cannot maintain control of the dog.

(3) The person accompanying the dog-in-training shall be liable for any damages or injuries caused by the dog, and any third party owner, lessor or manager of the public property shall in no way suffer liability for damages or injuries caused by the dog-in-training. If the person accompanying a dog-in-training is a minor, the parents of the child shall be liable. [I.C., § 18-5812B, as added by 1983, ch. 75, § 1, p. 161; am. 1992, ch. 58, § 4, p. 168; am. 1994, ch. 159, § 1, p. 359; am. 1997, ch. 267, § 7, p. 763.]

Compiler's notes. Section 2 of S.L. 1983, ch. 75 is compiled as § 56-704A.

Section 5 of S.L. 1992, ch. 58 is compiled as § 56-701A.

Section 2 of S.L. 1994, ch. 159 is compiled as § 56-701A.

Section 8 of S.L. 1997, ch. 267 is compiled as § 56-701A.

Cross ref. Person training guide dogs for the blind, rights and liabilities, § 56-704A.

18-5813. Implantation of foreign materials into the scalp — Penalty. [Repealed.]

Compiler's notes. Former § 18-5813, which comprised I.C., § 18-5813, as added by 1982, ch. 277, § 1, p. 709, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-5813 which comprised S.L. 1919, ch. 162, § 1, p. 530; C.S., § 2333;

I.C.A., § 53-704, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, was reenacted as § 18-5813 by S.L. 1972, ch. 336, § 1, effective April 1, 1972 and repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-5814. Barber shop closing hours — Penalty. [Repealed.]

Compiler's notes. Former § 18-5814, which comprised I.C., § 18-5814 as added by

S.L. 1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

18-5815. Conduct at pleasure resorts. [Repealed.]

Compiler's notes. Former § 18-5815, which comprised I.C., § 18-5815, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-5815, which com-

prised S.L. 1917, ch. 26, §§ 1, 2, p. 68; reen. C.L., § 6964; C.S., § 8378; I.C.A., § 17-3013 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5816. Abandonment of airtight containers without removing door locks prohibited. — It shall be unlawful for any person or persons to abandon, or to permit to remain in an abandoned state on his premises or on premises over which he exercises control, within the state of Idaho, any ice box, refrigerator, deep freeze, or similar appliance having a door which fastens automatically and which cannot be opened from the inside, without having first removed the lock or the hinges by which said door is attached to the body of the appliance. [I.C., § 18-5816, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1957, ch. 46, § 1, p. 81 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. Liability for injury or death of child in refrigerator. 86 A.L.R.2d 709.

18-5817. "Abandon" defined as leaving to attract children. — "Abandon" means leaving unattended and unclosed such appliance, in such manner and for such time that playing children may be attracted thereto, whether left upon the premises of the owner of the appliance or upon other premises. [I.C., § 18-5817, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1957, ch. 46, § 2, p. 81 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-5818. Violations a misdemeanor. — Any violation of this act shall constitute a misdemeanor. [I.C., § 18-5818, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1957, ch. 46, § 3, p. 81 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

The words "this act" used herein refer to §§ 18-5816 — 18-5818.

Cross ref. Penalty for misdemeanor not otherwise provided, § 18-113.

CHAPTER 59

PUBLIC NUISANCES

SECTION.

18-5901. Public nuisance defined.

18-5902. Public nuisance — Unequal damage.

18-5903. Punishment for nuisance.

SECTION.

18-5904. No smoking during public meetings.

18-5905. Signs to be displayed.

18-5906. Penalty for violation.

18-5901. Public nuisance defined. — Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal or basin, or any public park, square, street, or highway, is a public nuisance. [I.C., § 18-5901, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 130; R.S., R.C., & C.L., § 6910; C.S., § 8339; I.C.A., § 17-2701 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Cross ref. Nuisances in general, §§ 52-101 — 52-417.

ANALYSIS

Obstructions in street.

Removal of encroachments.

Obstructions in Street.

Warehouse and platform obstructing city street was a public nuisance, even though city

had allowed construction of same pursuant to a motion passed by city council and permit duly issued. *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952).

Removal of Encroachments.

Sellers' contention that purchasers were not bound to remove encroachments of tourist site and equipment sold to them upon demand by the city inasmuch as the city has permitted the existence of such encroachments for a considerable time was not well taken, and it became the duty of the purchasers to remove such encroachments, as failure to do so would result in both civil and criminal liability; such encroachments were a public nuisance and subject to abatement. *Galvin v. Appleby*, 78 Idaho 457, 305 P.2d 309 (1956).

Collateral References. 58 Am. Jur. 2d, Nuisances, §§ 34-146, 210-217.

66 C.J.S., Nuisances, § 1 et seq.

Attracting people in such numbers as to obstruct access to the neighboring premises to nuisance. 2 A.L.R.2d 437.

Coal yard, noise caused by operation of, as nuisance. 8 A.L.R.2d 419.

Judicial determination of whether building constitutes nuisance subject to destruction. 14 A.L.R.2d 82.

Animal rendering or bone-boiling plant for business as nuisance. 17 A.L.R.2d 1269.

Stockyard as nuisance. 18 A.L.R.2d 1033.

Use of phonograph, loud-speaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance. 23 A.L.R.2d 1289.

Dust as nuisance. 24 A.L.R.2d 194; 79 A.L.R.3d 253.

Tourist or trailer camp, motor court or motel as nuisance. 24 A.L.R.2d 571.

Private school or nuisance. 27 A.L.R.2d 1249.

House-to-house soliciting and peddling without invitation a nuisance. 35 A.L.R.2d 355; 77 A.L.R.2d 1221.

Sewage disposal plant as nuisance. 40 A.L.R.2d 1177.

Public dances or dance halls as nuisances. 44 A.L.R.2d 1381.

Smoke and dust as rendering quarry, gravel pit, or the like a nuisance. 47 A.L.R.2d 490.

Cemetery or burial ground as nuisance. 50 A.L.R.2d 1324.

Public dump as nuisance. 52 A.L.R.2d 1134.

Automobile sales lot or used car lot as nuisance. 56 A.L.R.2d 776.

Fishing, boating, bathing, or the like in inland lake, nuisance by. 57 A.L.R.2d 594.

Golf course or driving range as nuisance. 68 A.L.R.2d 1331.

Keeping of cats as enjoined nuisance. 73 A.L.R.2d 1032.

Merry-go-round as nuisance. 75 A.L.R.2d 803.

Validity of regulation of smoke and other air pollution. 78 A.L.R.2d 1305.

Water sports, amusements, or exhibitions as nuisance. 80 A.L.R.2d 1124.

Double parking a motor vehicle as nuisance. 82 A.L.R.2d 732.

Practice of exacting usury as nuisance. 83 A.L.R.2d 848.

Automobile wrecking yard or place of business as nuisance. 84 A.L.R.2d 653.

Oil refinery as nuisance. 86 A.L.R.2d 1322.

Drive-in restaurant or cafe as nuisance. 91 A.L.R.2d 572.

Dairy, creamery, or milk distributing plant as nuisance. 92 A.L.R.2d 974.

Private residential swimming pool as nuisance. 92 A.L.R.2d 1285.

Drive-in theatre of other outdoor dramatic or musical entertainment as nuisance. 93 A.L.R.2d 1171.

Gas company's liability on theory of nuisance, for personal injury or property damage caused by gas escaping from mains in street. 96 A.L.R.2d 1084.

Keeping pigs as a nuisance. 2 A.L.R.3d 931.

Keeping poultry as nuisance. 2 A.L.R.3d 965.

Motor bus or truck terminal as nuisance. 2 A.L.R.3d 1372.

Electric generating plant or transformer station as nuisance. 4 A.L.R.3d 902.

Saloons or taverns as nuisance. 5 A.L.R.3d 989.

Keeping of dogs as enjoined nuisance. 11 A.L.R.3d 1399.

Gun club, or shooting gallery or range, as nuisance. 26 A.L.R.3d 661.

Keeping of horses as nuisances. 27 A.L.R.3d 627.

Billboards and other outdoor advertising signs as civil nuisance. 38 A.L.R.3d 647.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 A.L.R.3d 601.

Operation of incinerator as nuisance. 41 A.L.R.3d 1009.

Laundry or dry cleaning establishment as nuisance. 41 A.L.R.3d 1236.

Automobile race track or drag strip as nuisance. 41 A.L.R.3d 1273.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Gasoline or other fuel storage tanks as nuisance. 50 A.L.R.3d 209.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Zoo as nuisance. 58 A.L.R.3d 1126.

Porno shops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Interference with radio or television reception as nuisance. 58 A.L.R.3d 1205.

Airport operations or flight of aircraft as nuisance. 79 A.L.R.3d 253.

Fence as nuisance. 80 A.L.R.3d 962.

Massage parlor as nuisance. 80 A.L.R.3d 1020.

Operation of cement plant as nuisance. 82 A.L.R.3d 1004.

Measure, elements, and amount of damages for killing or injuring cat. 8 A.L.R.4th 1287.

Tort immunity of nongovernmental charities — modern statutes. 25 A.L.R.4th 517.

Cat as subject of larceny. 55 A.L.R.4th 1080.

Liability for injuries caused by cat. 68 A.L.R.4th 823.

18-5902. Public nuisance — Unequal damage. — An act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal. [I.C., § 18-5902, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6911; C.S., § 8340; I.C.A., § 17-2702 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-5903. Punishment for nuisance. — Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor. [I.C., § 18-5903, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 130; R.S., R.C., & C.L., § 6912; C.S., § 8341; I.C.A., § 17-2703 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Removal of Encroachments.

Sellers' contention that purchasers were not bound to remove encroachments of tourist site and equipment sold to them upon demand by the city inasmuch as the city has permitted the existence of such encroach-

ments for a considerable time was not well taken, and it became the duty of the purchasers to remove such encroachments, as failure to do so would result in both civil and criminal liability. Such encroachments were a public nuisance and subject to abatement. *Galvin v. Appleby*, 78 Idaho 457, 305 P.2d 309 (1956).

Collateral References. Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances or prescribing a pecuniary penalty therefor. 12 A.L.R. 431; 121 A.L.R. 642.

Private nuisance not punishable criminally. 116 A.L.R. 1176.

18-5904. No smoking during public meetings. — For the purpose of this act, any meeting or hearing of any board, commission, council, department or agency of state, county, or local government, held within a building owned, rented, or being used by a governmental agency, to which the public is invited, or solicited, or legally entitled to attend is defined as a public meeting. Cigarette, cigar, and pipe smoking are prohibited during all periods when such public hearings or meetings are in progress. [I.C., § 18-5904, as added by 1975, ch. 121, § 1, p. 252.]

Compiler's notes. The words "this act" refer to S.L. 1975, ch. 121, §§ 1-3, compiled herein as §§ 18-5904 — 18-5906.

Sec. to sec. ref. This section is referred to in §§ 18-5906 and 39-5509.

18-5905. Signs to be displayed. — No smoking signs shall be displayed in the place of any such public meeting and upon request an area nearby, but outside the room in which the meeting is being held, shall be designated as an area where smoking is permitted. [I.C., § 18-5905, as added by 1975, ch. 121, § 2, p. 252.]

Sec. to sec. ref. This section is referred to in § 39-5509.

18-5906. Penalty for violation. — A violation of section 18-5904, Idaho Code, is punishable by a fine of not less than five dollars (\$5.00) nor more than ten dollars (\$10.00). [I.C., § 18-5906, as added by 1975, ch. 121, § 3, p. 252.]

Sec. to sec. ref. This section is referred to in § 39-5509.

CHAPTER 60

RAILROADS

SECTION.

18-6001. Permitting collision causing death.
 18-6002. Neglect to sound bell or whistle.
 18-6003 — 18-6005. [Repealed.]
 18-6006. Injuring railroad property.
 18-6007. Theft of car parts — Murder by wrecking.
 18-6008. Receiving stolen car parts.
 18-6009. Placing obstructions on tracks.
 18-6010. Obstruction or interference with railroad.

SECTION.

18-6011. Obstruction or interference with railroad — Act causing death.
 18-6012. Offenses against railroads.
 18-6013, 18-6014. [Repealed.]
 18-6015. Prohibition on disposal of human body waste from passenger trains.

18-6001. Permitting collision causing death. — Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad, car, locomotive or train, who wilfully or negligently suffers or causes the same to collide with another car, locomotive or train, or with any other object or thing whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one (1) nor more than ten (10) years. [I.C., § 18-6001, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6909; C.S., § 8338; I.C.A., § 17-2716 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cited in: State v. Nastoff, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

Federal Law Not Affected.

Violation of this section by interstate employee has no bearing upon his right to recover under federal employers' liability act of April 22, 1908 (45 U.S.C. §§ 51, 52). *Spokane & I.E.R.R. v. Campbell*, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125 (1916).

Collateral References. 65 Am. Jur. 2d, Railroads, § 1 et seq.

74, 75 C.J.S., Railroads, §§ 423 — 426, 678 — 689, 741 — 864, 905 — 1284.

18-6002. Neglect to sound bell or whistle. — Every person in charge of a locomotive engine who, before crossing any traveled public way, omits to

cause a bell to ring or steam, air, electric or other similar whistle to sound at the distance of at least eighty (80) rods from the crossing, and up to it, is guilty of a misdemeanor. [I.C., § 18-6002, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6923; C.S., § 8348; 1929, ch. 149, § 1, p. 273; I.C.A., § 17-2717 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-6003 — 18-6005. Intoxicated engineers or conductors — Violation of duty — Employment of illiterate trainmen. [Repealed.]

Compiler's notes. Former § 18-6003, which comprised I.C., § 18-6003, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 263, § 1, effective July 1, 1994.

Another former § 18-6003, which comprised R.S., R.C., & C.L., § 6924; C.S., § 8349; I.C.A., § 17-2718 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Former § 18-6004, which comprised I.C., § 18-6004, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 263, § 1, effective July 1, 1994.

Another former § 18-6004, which comprised R.S., R.C., & C.L., § 6926; C.S.,

§ 8351; I.C.A., § 17-2720 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Former § 18-6005, which comprised I.C., § 18-6005, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 263, § 1, effective July 1, 1994.

Another former § 18-6005, which comprised S.L. 1911, ch. 161, §§ 1, 2, p. 559; reen. C.L., § 6926a; C.S., § 8352; I.C.A., § 17-2721 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6006. Injuring railroad property. — Every person who maliciously removes, displaces, injures, or in any way interferes with, or changes, or destroys, any part of any railroad property, whether for cars propelled by steam or any other motive power, or any track of any railroad, or any branch or branchway, switch, block or other signal or signaling device, turnout, bridge, viaduct, culvert, embankment, station house or other structure or fixture, or any part thereof attached to or connected with any railroad, is punishable by imprisonment in the state prison not exceeding ten (10) years, or by fine not exceeding fifty thousand dollars (\$50,000), or by both fine and imprisonment, in the discretion of the court. [I.C., § 18-6006, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 263, § 2, p. 812.]

Compiler's notes. A former section, which comprised S.L. 1907, p. 316, § 1; reen. R.C. & C.L., § 7131; C.S., § 8513; I.C.A., § 17-4101 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6007. Theft of car parts — Murder by wrecking. — Any person or persons who shall remove, take, steal, change, add to, take from, or in any manner interfere with any journal bearings or brasses, or any parts or attachments of any locomotive, tender or car, or any fixture or attachment

belonging thereto, connected with, or used in operating any locomotive, tender or car, owned, leased or used by any railway or transportation company in this state, is guilty of a felony, and upon conviction thereof shall be subject to punishment by imprisonment in the penitentiary not less than one (1) nor more than fourteen (14) years, or by a fine of up to fifty thousand dollars (\$50,000), or by both such fine and imprisonment, in the discretion of the court: provided, that if the removal of such journal bearings or brasses, fixtures or attachments, as aforesaid, shall be the cause of wrecking any train, locomotive or other car in this state, whereby the life or lives of any person or persons shall be lost as the result of the felonious or malicious stealing, interfering with or removal of the fixtures, as aforesaid, the person or persons found guilty thereof shall be liable for murder as in other cases. [I.C., § 18-6007, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 263, § 3, p. 812.]

Compiler's notes. A former section, which comprised S.L. 1909, p. 81, § 1; reen. C.L., § 7131a; C.S., § 8514; I.C.A., § 17-4102 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section

added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Simulation of switch and car keys, § 18-3613.

18-6008. Receiving stolen car parts. — Every person who buys or receives any of the property described in section 18-6007, Idaho Code, knowing the same to have been stolen, is guilty of a felony, and upon conviction thereof shall be subject to the punishment provided in section 18-6007, Idaho Code. [I.C., § 18-6008, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 263, § 4, p. 812.]

Compiler's notes. A former section, which comprised S.L. 1909, H. B. 224, § 2; reen. C.L., § 7131b; C.S., § 8515; I.C.A., § 17-4103 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 5 of S.L. 1994, ch. 263 is compiled as § 18-6012.

18-6009. Placing obstructions on tracks. — Every person who maliciously places any obstruction upon the rails or track of any railroad, or of any switch, branch, branchway, or turnout connected with any railroad, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not less than six (6) months. [I.C., § 18-6009, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., § 7132, second part; reen. R.C. & C.L., § 7132; C.S., § 8516; I.C.A., § 17-4104 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the

present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: State v. Fife, 115 Idaho 879, 771 P.2d 543 (Ct. App. 1989).

18-6010. Obstruction or interference with railroad. — Any person or persons who shall wilfully or maliciously place any obstruction on any railroad track or roadbed, or street car track in this state, or who shall loosen, tear up, remove or misplace any rail, switch, frog, guard rail, cattle guard, or any part of such railroad track or roadbed or street car track, or

who shall tamper with or molest any such road, roadbed or track, or who shall destroy or damage any locomotive, motor or car on said track, or who shall otherwise interfere with the maintenance or operation of such road so as to endanger the safety of any train, car, motor or engine, or so as to endanger or injure any passenger or person riding thereon, or being about the same, shall, upon conviction thereof, be punished by imprisonment in the penitentiary for any term not exceeding twenty (20) years nor less than five (5) years. [I.C., § 18-6010, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1893, P. 68, § 1; reen. 1899, p. 182, § 1; reen. R.C. & C.L., § 7140; C.S., § 8524; I.C.A., § 17-4105 was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6011. Obstruction or interference with railroad — Act causing death. — Any person or persons who shall, within this state, wilfully or maliciously place any obstruction upon any railroad track or roadbed or street car track, or shall misplace, remove, obstruct, detach, damage or destroy any rail, switch, frog, guard rail, cattle guard, or any other part of such railroad track or roadbed or street car track, or who shall otherwise interfere with the maintenance and operation of such road, thereby causing the death of any person, whether passenger or employee of such railroad, or street railway, or otherwise, shall, upon conviction thereof, be deemed guilty of a felony and be punished by imprisonment in the penitentiary for a term not less than five (5) years and which may extend to the natural life of such person so found guilty, or may be tried and punished for murder. But this section shall not in any way lessen the liability of the railroad company where a wreck may hereafter occur in the state of Idaho. [I.C., § 18-6011, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1893, P. 68, § 2; reen. 1899, P. 182, § 2; reen. R.C. & C.L., § 7141; C.S., § 8525; I.C.A., § 17-4106 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986).

18-6012. Offenses against railroads. — Any person disturbing the peace of any traveler on any railway train, or breaking the seal or forcibly entering any car, or disturbing the contents of any car, or breaking any package therein, or breaking any package left at any depot for transportation or delivery, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment. [I.C., § 18-6012, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 263, § 5, p. 812.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7212; C.S., § 8591; I.C.A., § 17-4605 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Section 4 of S.L. 1994, ch. 263 is compiled as § 18-6008.

Cross ref. Stealing rides on trains, §§ 18-4617 — 18-4620.

18-6013, 18-6014. Offenses against railroads — Trainmen may arrest — Accused to be taken before magistrate. [Repealed.]

Compiler's notes. Former § 18-6013, which comprised I.C., § 18-6013, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 263, § 6, effective July 1, 1994.

Another former § 18-6013, which comprised R.S., R.C., & C.L., § 7213; C.S., § 8592; I.C.A., § 17-4606 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Former § 18-6014, which comprised I.C., § 18-6014, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 263, § 6, effective July 1, 1994.

Another former § 18-6014, which comprised R.S., R.C., & C.L., § 7214; C.S., § 8593; I.C.A., § 17-4607 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6015. Prohibition on disposal of human body waste from passenger trains. — (1) As used in this section:

- (a) "Human body waste" means excrement, feces or other waste material discharged from the human body.
- (b) "Passenger train" means any train operated by a railroad company or corporation or operated by an entity created by federal law, for the primary purpose of transporting passengers.
- (c) "Person" means an individual, trust, firm, joint stock company, corporation, partnership, association, state, state or federal agency or entity, city, commission, or political subdivision of a state.

(2) No person operating or controlling any passenger train through or within this state may knowingly and openly place, throw, release, discharge, or deposit human body waste from a passenger train upon the right-of-way over which it operates.

(3) Any person who violates any provision of this section is guilty of a misdemeanor.

(4) The department of environmental quality and the public health districts shall enforce the provisions of this section. [I.C., § 18-6015, as added by 1990, ch. 189, § 1, p. 419; am. 2001, ch. 103, § 3, p. 253.]

Compiler's notes. Sections 2 and 4 of S.L. 2001, ch. 103 are compiled as §§ 9-342A and 22-3413, respectively.

Section 2 of S.L. 1990, ch. 189 provided that

the act should be in full force and effect on and after August 1, 1990. Approved March 29, 1990.

CHAPTER 61

RAPE

SECTION.

- 18-6101. Rape defined.
- 18-6102. Proof of physical ability.
- 18-6103. Penetration.
- 18-6104. Punishment for rape.
- 18-6105. Evidence of previous sexual conduct of prosecuting witness.

SECTION.

- 18-6106. Restitution to victim.
- 18-6107. Rape of spouse.
- 18-6108. Male rape.
- 18-6109. Punishment for male rape.
- 18-6110. Sexual contact with a prisoner.

18-6101. Rape defined. — Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female under any one (1) of the following circumstances:

1. Where the female is under the age of eighteen (18) years.
2. Where she is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental deficiency or developmental disability, whether temporary or permanent, of giving legal consent.
3. Where she resists but her resistance is overcome by force or violence.
4. Where she is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anaesthetic substance.
5. Where she is at the time unconscious of the nature of the act. As used in this section, "unconscious of the nature of the act" means incapable of resisting because the victim meets one (1) of the following conditions:
 - (a) Was unconscious or asleep;
 - (b) Was not aware, knowing, perceiving, or cognizant that the act occurred.
6. Where she submits under the belief that the person committing the act is her husband, and the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief.
7. Where she submits under the belief, instilled by the actor, that if she does not submit, the actor will cause physical harm to some person in the future; or cause damage to property; or engage in other conduct constituting a crime; or accuse any person of a crime or cause criminal charges to be instituted against her; or expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule. [I.C., § 18-6101, as added by 1972, ch. 336, § 1, p. 844; am. 1977, ch. 208, § 1, p. 573; am. 1994, ch. 83, § 1, p. 197; am. 1994, ch. 135, § 1, p. 307; am. 2000, ch. 218, § 1, p. 606; am. 2003, ch. 280, § 1, p. 756.]

Compiler's notes. A former section, which comprised R.S., § 6795; 1895, P. 19, § 1; reen. 1899, P. 167, § 1; reen. R.C. & C.L., § 6795; C.S., § 8262; I.C.A., § 17-1601 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

This section was amended by two 1994 acts — ch. 83, § 1, and ch. 135, § 1, both effective July 1, 1994 — which do not appear to conflict and have been compiled together.

The 1994 amendment by ch. 83, § 1, in the introductory paragraph, substituted "defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis" for "an act of sexual intercourse" and added a comma following "intoxicating" in subdivision (4).

The 1994 amendment by ch. 135, § 1, substituted "any unsoundness" for "lunacy or any

other unsoundness" in subdivision (2) and added a comma following "intoxicating" in subdivision (4).

Section 2 of S.L. 1977, ch. 208 is compiled as § 18-6105.

Section 2 of S.L. 1994, ch. 135 is compiled as § 18-6108.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Section 2 of S.L. 2003, ch. 280 is compiled as § 19-401.

Cross ref. Assault with intent to commit rape, § 18-907.

Medical examination of victim, cost paid by law enforcement agency, § [19-5303] 19-5302.

Sec. to sec. ref. This chapter is referred to in § 18-7905.

This section is referred to in §§ 16-2002, 18-310, 18-6107, 18-8303, 18-8304, 18-8314, 19-401, 19-2520, 19-2520C, 19-5307, 19-5506,

20-525A, 33-1208, 39-1113 and 72-1025.

Cited in: *State v. Irwin*, 9 Idaho 35, 71 P. 608, 60 L.R.A. 716 (1903); *State v. Simes*, 12 Idaho 310, 85 P. 914 (1906); *State v. Cornwall*, 95 Idaho 680, 518 P.2d 863 (1974); *State v. Elisondo*, 97 Idaho 425, 546 P.2d 380 (1976); *State v. Swain*, 105 Idaho 743, 672 P.2d 1073 (Ct. App. 1983); *State v. Winkler*, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987); *State v. Cheney*, 116 Idaho 917, 782 P.2d 40 (Ct. App. 1989); *State v. Salter*, 125 Idaho 418, 871 P.2d 835 (Ct. App. 1994); *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996); *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997); *State v. Mayer*, — Idaho —, 84 P.3d 579 (Ct. App. 2004).

ANALYSIS

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Age of Female.

It is generally held that lack of knowledge on part of defendant as to the age of

prosecutrix, or even belief that she is over the specified age, is not a defense. *State v. Suennen*, 36 Idaho 219, 209 P. 1072 (1922).

In a prosecution for statutory rape on a female under 18 years of age, the defendant may be convicted of simple assault and the refusal of the trial court to so instruct is reversible error. *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928).

A reasonable mistake of fact as to the victim's age is no defense to statutory rape. *State v. Stiffler*, 114 Idaho 935, 763 P.2d 308 (1988), aff'd, 117 Idaho 405, 788 P.2d 220 (1990).

Where factual circumstances warrant, the sentencing court in a statutory rape case may consider the reasonable belief of an accused as to the victim's age as a mitigating factor under §§ 19-2515 and 19-2521. *State v. Stiffler*, 114 Idaho 935, 763 P.2d 308 (Ct. App. 1988), aff'd, 117 Idaho 405, 788 P.2d 220 (1990).

Four-year fixed sentence for rape was not unreasonable and judge properly considered that defendant's relationship with victim was consensual, she was a very willing participant in the sexual relationship, her parents knew of the friendship, she had turned 16 years old by the time defendant's probation was revoked and the sentences for assault and statutory rape were ordered into effect, defendant loved victim when the two were having intercourse, that victim instigated a good share of what happened, and that defendant was less mature than an average man his age. *State v. Adams*, 120 Idaho 350, 815 P.2d 1090 (Ct. App. 1991).

Because "unsoundness of mind" in § 18-6101(2) did not include the normal mental capacity of a four-year-old child, the state was not entitled to charge defendant, a minor, with a violation of the statute where the victim was a four-year-old child with normal mental development; because the only crime with which defendant could be charged, statutory rape in violation of § 18-6101(1), did not provide for the waiver of juvenile jurisdiction, defendant was not to be tried as an adult. *State v. Doe*, 137 Idaho 691, 52 P.3d 335 (Ct. App. 2002).

Alternative Circumstances.

This section lists alternative "circumstances" under which a crime of rape may be charged; it was meant to put beyond doubt that proof of the various circumstances mentioned would establish the crime of rape. It did not intend to create six different crimes. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

Appeal by State.

The Supreme Court would not give I.A.R. 11(c)(6) a construction which would allow the state an appeal when a rape prosecution was dismissed subsequent to a guilty verdict but

prior to entry of judgment, nor would the court exercise its plenary power to review such a dismissal since nothing in the record or historical Idaho jurisprudence suggested that post guilty verdict dismissals have been frequent or are likely to become frequent, and thus, the case did not present a recurring question, the resolution of which would be of substantial importance in the administration of justice in this state. *State v. Dennard*, 102 Idaho 824, 642 P.2d 61 (1982).

Assault With Intent to Rape.

Informations held sufficient: *State v. Beard*, 6 Idaho 614, 57 P. 867 (1899); *State v. Neil*, 13 Idaho 539, 90 P. 860 (1907).

In prosecution for assault with intent to commit rape, it is essential that the state prove every fact necessary to constitute rape, except penetration. *State v. Neil*, 13 Idaho 539, 90 P. 860 (1907).

Voluntary desistance by defendant is complete defense. *State v. Johnson*, 26 Idaho 609, 144 P. 784 (1914).

Gravamen of offense of attempt to commit rape is the specific intent with which assault is made. *State v. Andreason*, 44 Idaho 396, 257 P. 370 (1927).

Assault with intent to commit rape is included in crime of rape and there is no necessity of charging commission of higher crime with force and violence in case of statutory rape, in order to permit verdict for lesser offense. *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928).

Where the defendant restrained the 11-year-old girl by force, and touched her on the thigh with his penis, before she escaped, the jury did not unjustifiably infer an intent to have sexual intercourse with the girl. *State v. Greensweig*, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

The crime of attempted rape is an included offense in the crime of assault with intent to commit rape; specific intent to commit the rape is an element of both attempted rape and assault with intent to rape where the rape itself is not consummated. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Bastardy Proceedings.

Session Laws 1925, ch. 198, making it a misdemeanor for a man, not being the husband of a woman, to get her with child, and providing for proceedings in bastardy cases, is unconstitutional. *State v. Wilmot*, 51 Idaho 233, 4 P.2d 363 (1931).

Burden of Proving Force.

In prosecution for rape against woman not under legal disability to give consent, state must prove force or violence; it is error for court to charge that, the acts being committed, the burden is on defendant to prove absence of force or violence. *State v. Fowler*, 13 Idaho 317, 89 P. 757 (1907).

Burglary.

Inasmuch as neither rape nor burglary is a lesser included offense of the other, a burglary was complete when defendant entered the victim's residence with the intent to commit rape, whereas the rape was not committed until there was an act of sexual intercourse, and each of these crimes required proof of separate essential elements not required of the other and the conviction of one would not bar conviction of the other. *State v. McCormick*, 100 Idaho 111, 594 P.2d 149 (1979).

Character of Accused.

Evil disposition of defendant may not be shown by acts against a different girl, totally dissociated and remote in time from act of which he is accused. *State v. Larsen*, 42 Idaho 517, 246 P. 313 (1926), rev'd on other grounds, 44 Idaho 270, 256 P. 107 (1927).

Character of Female.

It is as much a crime to have sexual intercourse with an unchaste female under age of consent as with a chaste one. *State v. Anthony*, 6 Idaho 383, 55 P. 884 (1899); *State v. Hammock*, 18 Idaho 424, 110 P. 169 (1910); *State v. Henderson*, 19 Idaho 524, 114 P. 30 (1911); *State v. Dowell*, 47 Idaho 457, 276 P. 39, 68 A.L.R. 1061 (1929).

Consent.

Ability to give legal consent is properly defined in terms of (1) the ability to understand and appreciate the possible consequences of sexual intercourse, and (2) the ability to make a knowing choice. *State v. Soura*, 118 Idaho 232, 796 P.2d 109 (1990).

The fact that a mentally disabled victim in a sexual assault prosecution resisted an invasion of her body could have been understood by the jury to demonstrate that the victim, like all humans, has volitional abilities; her resistance and non-resistance did not conclusively establish that she understood and appreciated the physical, emotional and moral consequences of sexual intercourse with the defendant. *State v. Soura*, 118 Idaho 232, 796 P.2d 109 (1990).

A determination of capability for legal consent depends in large part on the activity involved and the purposes of the laws governing that activity, and it did not follow that the victim in a sexual assault prosecution was capable of legally consenting to sexual intercourse with defendant by inference because she had otherwise been deemed capable of legally consenting to marriage, sexual relations within marriage, and termination of parental rights to her infant daughter. *State v. Soura*, 118 Idaho 232, 796 P.2d 109 (1990).

Section 18-6101(2) prohibits sexual inter-

course only with a female who can be deemed of unsound mind due to mental illness, organic injury, mental retardation, or other mental abnormality. *State v. Doe*, 137 Idaho 691, 52 P.3d 335 (Ct. App. 2002).

Constitutionality.

Amendment of 1895 was constitutionally passed. *State v. McGraw*, 6 Idaho 635, 59 P. 178 (1899).

This section does not violate the equal protection rights of males because rape, by definition, is an act of sexual intercourse, in which the body of a female is penetrated; the sexes are not similarly situated with respect to the act of rape as nature has provided that only a male can accomplish the penetration by sexual intercourse. A female might aid or abet a rape, or she might violate the body of another person by means other than sexual intercourse, but she is physiologically incapable of the act of rape and this dissimilarity between the sexes constitutes an adequate basis for classifying males as the only persons subject to prosecution under the Idaho rape law. *State v. Greensweig*, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

Protection of women from rape is a legitimate, important state objective as rape is a peculiarly degrading form of assault which often results in a profound, enduring emotional trauma that only its victims can fully comprehend and, unlike any other crime that might be committed against a victim of either sex, rape forcibly imposes upon females the unique risk of unwanted pregnancy. The consequences of rape are not gender-neutral and the gender classification embodied in the rape law bears a substantial relationship to the law's protective purpose. *State v. Greensweig*, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

In this section, the state is attempting to protect women from sexual intercourse at an age when the physical, emotional and psychological consequences of sexual activity are particularly severe; because males alone can physiologically cause the result which the law properly seeks to avoid, a law punishing a male for sexual intercourse with a teenager under the age of 18 could certainly help deter this conduct. Therefore, subdivision (1) of this section is not unconstitutional as violative of the equal protection clauses of the Idaho State Constitution and the United States Constitution. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

Conviction on Testimony of Prosecutrix.

A defendant may be convicted of statutory rape on the uncorroborated testimony of the prosecutrix where the character of the prosecutrix for truth remains unimpeached, her character for chastity remains unimpeached, and the circumstances surrounding the offense are clearly corroborative

of the statements of the prosecutrix. *State v. Gee*, 93 Idaho 636, 470 P.2d 296 (1970).

Corroboration of Prosecutrix.

Note: Many of the cases decided hereunder were decided prior to *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981) which held that the requirement of corroboration in sex crime cases is no longer the law in Idaho.

Conviction for rape may be had upon uncorroborated evidence of prosecutrix, but when the evidence of such prosecutrix is of contradictory nature or her chastity or her reputation for truthfulness is impeached, her testimony must be corroborated or judgment will be set aside. *State v. Anderson*, 6 Idaho 706, 59 P. 180 (1899); *State v. Trego*, 25 Idaho 625, 138 P. 1124 (1914); *State v. Short*, 39 Idaho 446, 228 P. 274 (1924); *State v. Bowker*, 40 Idaho 74, 231 P. 706 (1924).

Evidence that accused and prosecutrix were frequently together under circumstances in which he could have violated her, and that she became pregnant during such time and subsequently gave birth to child whose paternity she charges to him, held sufficient to corroborate her testimony of his guilt. *State v. Mason*, 41 Idaho 506, 239 P. 733 (1925).

Evidence of defendant's attempt to procure absence of prosecutrix along with other statements of his, overheard and detailed by witness other than prosecutrix, was sufficient corroboration of prosecutrix. *State v. Smith*, 46 Idaho 8, 265 P. 666 (1928).

Testimony of mother of prosecutrix in calling for her children and finding that prosecutrix alone was away with defendant, and her relation of what followed, was sufficient to corroborate testimony of prosecutrix. *State v. Haskins*, 49 Idaho 384, 289 P. 609 (1930).

Judgment of conviction of rape based upon testimony of prosecutrix alone can not be sustained in any event unless circumstances surrounding commission of offense are clearly corroborative of her statements. *State v. Short*, 39 Idaho 446, 228 P. 274 (1924); *State v. Bowker*, 40 Idaho 74, 231 P. 706 (1924); *State v. Hines*, 43 Idaho 713, 254 P. 217 (1927); *State v. Larsen*, 44 Idaho 270, 256 P. 107 (1927); *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947).

Evidence of opportunity alone is not sufficient to furnish corroboration contemplated by statute. *State v. Short*, 39 Idaho 446, 228 P. 274 (1924); *State v. Bowker*, 40 Idaho 74, 231 P. 706 (1924); *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947).

Uncorroborated testimony of prosecutrix is generally considered insufficient where it is inconsistent with admitted facts; where it contains numerous and serious contradictions; where it is inherently improbable or

incredible; or where it is obtained through threats, coercion, or duress. *State v. Bowker*, 40 Idaho 74, 231 P. 706 (1947).

A defendant may be convicted of the crime of rape upon the uncorroborated testimony of the prosecutrix; but this is only so when the character of the prosecutrix for chastity, as well as for truth, is unimpeached, and where the circumstances surrounding the commission of the offense are clearly corroborative of the statements of the prosecutrix. *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947).

What is meant by the rule of evidence that the facts and circumstances surrounding the commission of the offense are corroborative and not contradictory of the statements of the prosecutrix is that they must not only support the testimony of the prosecutrix that her person has been violated, but should also be of such a character as to make it appear probable that the accused committed the offense. *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947).

No hard and fast rule can be laid down on the subject of corroboration; each case must depend upon its own merit and surrounding circumstances. *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947).

The requirement of corroboration in sex crime cases is no longer the law in Idaho. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Where the conviction of a defendant in a rape case was appealed to the supreme court which struck down the requirement for corroboration in rape cases, such decision altered the legal rules of evidence so that less or different testimony than the law required at the time of the commission of the offense was necessary in order to convict the offender; accordingly, the conviction, which was not supported by sufficient corroborating evidence, was reversed since to have held defendant to the new standard would have violated the prohibition of Idaho Const., Art. I, § 16 and U.S. Const., Art. I, § 10 against ex post facto laws. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

The new rule of the supreme court that corroboration is unnecessary in rape cases prosecuted under this section will only be applied prospectively. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

—Chastity.

Where the chastity and consent of the prosecutrix are irrelevant for purposes of proving the necessary elements of statutory rape, the issue of her chastity is relevant with respect to the amount of corroboration necessary to support her testimony. *State v. Gee*, 93 Idaho 636, 470 P.2d 296 (1970).

In a prosecution for statutory rape, testimony that prosecutrix did not date anyone

else but the defendant during the period within which conception must have occurred is corroborative of her direct testimony that the defendant had unlawful relations with her. *State v. Gee*, 93 Idaho 636, 470 P.2d 296 (1970).

Counsel.

An accused rapist was not entitled to have counsel present at the photographic lineups and showups at which he was identified by the victims and eyewitnesses. *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

Upon retrial of the defendant for rape, the defense attorney's decision not to interview the victim was not clearly improper where he had an opportunity to study her prior sworn testimony. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

In prosecution for rape, the defense attorney's failure to investigate the victim's prior sexual contacts did not constitute inadequacy of counsel and the defendant failed to show prejudice in the light of all the other evidence corroborating the victim's testimony. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

In prosecution for rape, the record sustained the trial court's finding that the defendant's conviction was not the result of any alleged incompetent counsel, but resulted from the strong identification testimony of the victim, corroborated by other witnesses at the scene, and the defendant's totally unbelievable explanation for leaving the hotel right after he had checked in and paid for his room, only to be found sleeping in his car. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

Deposition of Prosecutrix.

Where there was no showing whatsoever that the prosecutrix would be unable to attend the trial, there were no grounds upon which to grant the motion to take the deposition of the prosecutrix and the court did not err in refusing to allow it. *State v. Filson*, 101 Idaho 381, 613 P.2d 938 (1980).

Elements of Attempt.

An overt act is a required element of the crime of attempted rape. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Evidence.

State may prove by prosecutrix and other witnesses that she made complaint soon after commission of alleged act, and show when, where, and to whom and under what circumstances she made complaint, and her appearance, demeanor, and physical condition at time she made complaint; but details of the conversations had and name of person accused by her may not be given by witness. *State v. Black*, 36 Idaho 27, 208 P. 851 (1922); *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928).

Direct and positive evidence of absence of marital relation is not necessary. *State v. Jeanoes*, 36 Idaho 810, 213 P. 1017 (1923).

Leading questions are permitted where prosecutrix is a young and unsophisticated girl. *State v. Larsen*, 42 Idaho 517, 246 P. 313 (1926), *rev'd* on other grounds, 44 Idaho 270, 256 P. 107 (1927).

Asking leading questions is within discretion of court. *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928); *State v. Alvord*, 47 Idaho 162, 272 P. 1010 (1928).

Evidence of doctor as to result of his examination of prosecutrix nearly two months after date of alleged offense held admissible, the remoteness going to its weight. *State v. Smith*, 46 Idaho 8, 265 P. 666 (1928).

Evidence that defendant had offered prosecuting witness and others intoxicating liquor shortly before commission of alleged offense is not admissible as part of *res gestae*, but it is admissible as tending to show that defendant planned by its use to accomplish his purpose. *State v. Alvord*, 47 Idaho 162, 272 P. 1010 (1928).

Statements of accused made just before alleged act of intercourse that he had some "doctor instruments" and would help prosecutrix if she were going to have a baby, were admissible as tending to prove a plan or design. *State v. Alvord*, 47 Idaho 162, 272 P. 1010 (1928).

Evidence of improper conduct between accused and a girl other than prosecutrix, in presence of prosecutrix, was admissible. *State v. Dowell*, 47 Idaho 457, 276 P. 39, 68 A.L.R. 1061 (1929).

Testimony of prosecutrix was not required to be corroborated where testimony was not in conflict with physical evidence and surrounding circumstances and character of prosecutrix was not seriously impeached. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Admission of photograph showing scratches on face of defendant taken by sheriff on day following alleged assault did not violate constitutional immunity of defendant against self incrimination. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Photographs showing condition of prosecutrix' face on morning following alleged assault, and photograph showing scene of alleged assault were properly admitted in evidence. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Objection by defendant charged with rape to testimony of prosecutrix on redirect examination that she complained to mother and showed her condition of clothes on ground that matter was not gone into on cross-examination, was properly overruled where prosecutrix testified on cross-examination that she did not complain to her companions.

State v. Linebarger, 71 Idaho 255, 232 P.2d 669 (1951).

To permit medical testimony, in a trial for rape, as to pain experienced by victim compared with that of a new bride, is reversible error. *State v. Wilson*, 93 Idaho 194, 457 P.2d 433 (1969).

The mere fact that the testimony of witnesses in a statutory rape case was sharply conflicting only raised questions as to the credibility of the witnesses and the weight to be given their testimony, and these were matters which were exclusively for the jury's determination. *State v. Gee*, 93 Idaho 636, 470 P.2d 296 (1970).

Trial court properly permitted the prosecuting witness in a rape trial to testify that a co-defendant had forced her to perform oral sodomy upon him, since the jury was entitled to base its decision upon a full and accurate description of the events concerning the whole criminal act, regardless of whether such a description also implicates a defendant in other criminal acts. *State v. Izatt*, 96 Idaho 667, 534 P.2d 1107 (1975).

Force or threats of bodily harm which prevent a victim's resistance may be expressed by acts and conduct of the accused as well as by verbalized threats or displays of weaponry. *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975).

In a rape prosecution, evidence presented by testimony of the investigating officer, the doctor had examined the prosecutrix, and an expert in conducting microscopic examinations of hairs and fibers, when taken and considered in its entirety was sufficient to corroborate prosecutrix' account of the alleged rape and sufficient to support defendant's conviction. *State v. Kraft*, 96 Idaho 901, 539 P.2d 254 (1975), appeal dismissed, 99 Idaho 214, 579 P.2d 1197 (1978).

In a prosecution for forcible rape where prosecutrix had been in defendant's presence for five and three-quarters hours, had looked at his face in a well-lit gas station, and had given a detailed description of her assailant to police officers a short time after the incident, the trial court's admission into evidence of five photographs which were used in a pre-trial photographic lineup that included defendant was not error, even though prosecutrix had gone to high school with three of the men pictured and recognized them during the lineup. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

In a prosecution for rape, the admission into evidence of a mugshot of defendant was not error where the mugshot was offered to prove an extrajudicial identification of defendant and where the trial judge instructed the jury that the photograph merely showed that defendant had been arrested and that it was not to be considered evidence that defendant

had any prior criminal record. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

In rape prosecution, it was immaterial whether hair samples matching defendant's hair were located in the victim's bra or underpants; their presence in either place was equally indicative of the defendant's involvement with her. Moreover, where nurse testified to having sealed the envelope containing four hairs and the criminalist testified that these items were sealed when she received them but also testified that when she opened the envelope five hairs were found in it, considering the fragile nature of the hairs, it was entirely possible that one could have broken into two pieces and in all reasonable probability the article was not changed in any material respect. Accordingly, the hairs were properly admitted as evidence. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

Where officer observed a nurse bring a pair of underpants out of the emergency room where rape victim was being examined and hand them to victim's mother who put the underpants in her coat pocket and officer then transported the victim and her mother to second hospital, and while there he saw the mother take the underpants out of her pocket and hand them to the nurse, in all reasonable probability the underpants were not changed in any material respect. Therefore, no error occurred in admitting the underpants into evidence. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

Where the victim, in a rape prosecution, testified that the defendant had been wearing "checkered pants with tan color," but the arresting officer testified the pants the defendant was wearing were blue, and blue pants were admitted into evidence, the prosecutor's comment concerning the color-blindness of the victim could have been inferred from this evidence and was not calculated to inflame the minds of the jurors and arouse prejudice or passion against the accused. The comment was not so inherently prejudicial that an objection, accompanied by an instruction by the court to disregard the comment, would not have cured the defect; accordingly, defendant's failure to object precluded appellate review. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

The trial court in a rape prosecution did not err in refusing to admit the expert testimony of a psychiatrist concerning the reliability of eyewitness identification, since the admissibility of expert testimony is discretionary with the trial court and absent an abuse of discretion, a decision will not be disturbed on appeal. *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

Where the admissible evidence provided beyond a reasonable doubt, overwhelming

and conclusive proof that the defendant was guilty of rape, the admission of the court reporter's testimony, regarding an incriminating statement which she heard defendant make to his counsel at the preliminary hearing, if erroneous, was harmless. *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

On appeal from a conviction of rape, where the defendant had requested a disclosure of the state's evidence, under I.C.R. 16, and in response the state disclosed evidence of a torn piece of panties found at the alleged scene of the rape and also listed a criminalist as a potential expert witness, the defendant was not prejudiced by the state's late disclosure of such criminalist's forensic laboratory report identifying the torn piece of panties as belonging to the victim, where the state delivered such report to the defendant's counsel on the day it was received by the state, although only three days before trial, and where there was no evidence that the expert misidentified the piece of evidence. *State v. Hansen*, 108 Idaho 902, 702 P.2d 1362 (Ct. App. 1985).

The district court did not err when it stated that the state laboratory found that the defendant was a Type O secreter where the forensic chemist for the state laboratory testified that the defendant had Type O blood, she further testified that a blood test performed on a sample of the defendant's blood indicated that the defendant was a secreter and she found the result of a saliva test which showed that the defendant was not a secreter, was at best anomalous. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

In prosecution for rape the evidence was more than sufficient to corroborate the victim's testimony, where the defendant asked the bartender what the victim's hotel room number was, he then checked into the hotel, bought a bottle of wine which he had been advised was her favorite brand, and went upstairs from the bar to where both his room and the victim's room were located, approximately an hour later, the bartender heard the victim's screams, heard someone running down the stairs, and observed that the defendant's automobile, which had been parked in front of the hotel, was gone, and the defendant was found in possession of a knife substantially identical to that described by the victim shortly after the rape. *State v. Estes*, 111 Idaho 430, 725 P.2d 128 (1986).

Where, in prosecution for rape, the defendant admitted engaging in intercourse with the alleged victim, and the only material issue was whether the intercourse had been consensual or forced, the testimony concerning "passes" made by the defendant toward other women on the day of the alleged rape had marginal relevancy and carried a high risk of unfair prejudice. *State v. Clay*, 112

Idaho 261, 731 P.2d 804 (Ct. App. 1987).

Where, in a prosecution for rape and lewd and lascivious conduct with a minor, a physician did not suggest how, when or by whom a bruise could have been caused, but simply opined that a bruise observable one day would likely be visible a few days later, there was no error in allowing the testimony. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

In prosecution for rape and lewd and lascivious conduct with a minor, expert opinion regarding the social beliefs, characteristics and mores of the local Hispanic people, particularly the females' desire to protect their husbands or lovers, would not be relevant to show that the victim and her mother might have been trying to protect the actual perpetrator of the crimes charged against the defendant, where the defendant did not produce any evidence reasonably tending to show that another person committed the crimes. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Where testimony presented at trial established to the satisfaction of the jury that defendant had intercourse with the girl in the bedroom, then left the bedroom and went to the living room for an unspecified period of time, and then returned to the bedroom and again engaged in sexual intercourse with the girl, the jury was properly instructed, and there was substantial evidence in the record supporting its findings that there were two separate and distinct acts of rape. *State v. Grinolds*, 121 Idaho 673, 827 P.2d 686 (1992).

The evidence was sufficient to support defendant's convictions for rape and first degree kidnapping. *State v. Whiteley*, 124 Idaho 261, 858 P.2d 800 (Ct. App. 1993).

Force.

Evidence of force clearly is not required to support a finding of rape under subdivision 4 of this section. *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991).

Evidence of physical injury is not necessary to establish the use of force in a rape prosecution. It was relevant, however, where it tended to corroborate the complaining witness' version of the events surrounding the alleged rape and to contradict the defendant's claim of consent. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Harmless Error.

Where even if the prosecutor's statement that defendant took victim's virginity away from her had been properly excluded from the trial, there was ample evidence to convince appellate court beyond a reasonable doubt that the jury would still have arrived at the same verdict, the comment amounted to harmless error. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

The district court did not commit prejudi-

cial error when it admitted testimony from a deputy sheriff that victim had identified defendant in a photographic lineup. Although defendant admitted to having sex with victim on the night in question, admission of a consistent statement by victim on the undisputed facts did not contribute to the verdict of the jury, where the sole issue before it was consent. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Impeachment of Prosecutrix.

In prosecution for rape of female under age of consent, evidence of acts of familiarity on the part of prosecutrix with men other than defendant is not admissible for purpose of discrediting and impeaching her. *State v. Pettit*, 33 Idaho 326, 193 P. 1015 (1920); *State v. Farmer*, 34 Idaho 370, 201 P. 33 (1921); *State v. Black*, 36 Idaho 27, 208 P. 851 (1922); *State v. Alvord*, 47 Idaho 162, 272 P. 1010 (1928); *State v. Dowell*, 47 Idaho 457, 276 P. 39, 68 A.L.R. 1061 (1929).

Where state introduces expert medical testimony tending to show that act of sexual intercourse had been committed, accused may introduce evidence tending to show that prosecutrix had had sexual intercourse with others, thus negating inference of guilt drawn from medical expert's testimony. *State v. Pettit*, 33 Idaho 326, 193 P. 1015 (1920).

The reputation of the prosecutrix for chastity remained unimpeached where the record was devoid of evidence tending to show that she was of unchaste character prior to engaging in sexual relations with the defendant, and the evidence of prior acts of intercourse between the prosecutrix and the defendant did not defeat her claim of chastity. *State v. Gee*, 93 Idaho 636, 470 P.2d 296 (1970).

In prosecution for forcible rape where defendant did not base his defense on consent and offered no evidence to support such a claim, neither the evidence of the general reputation of the prosecutrix for unchastity, nor specific acts of sexual intercourse between her and others besides defendant were admissible. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

In prosecution for forcible rape where defendant sought to interrogate the prosecutrix and the doctor who examined her as to whether prosecutrix was a virgin prior to the alleged attack, but where defendant made no attempt to deal with specific acts of intercourse during the time period of the attack, the trial court was correct in finding such questioning inadmissible. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

In prosecution for forcible rape, where no foundation was laid for the purpose of impeaching testimony of prosecutrix, the question of prosecutrix' virginity was not relevant

to her reputation for truth, honesty and veracity. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

Incest.

Where the defendant was charged with the rape of an 18-year-old woman under this section, but the information made no reference to the fact that the victim was the defendant's daughter, the defendant could not be convicted of incest under § 18-6602, since incest is not a lesser included offense of rape and since it would violate due process to convict a defendant for a crime not charged; however, upon the setting aside of the conviction of incest, there was no constitutional barrier to a subsequent prosecution for that offense, since the defendant had never been charged with and prosecuted for the crime of incest. *State v. Madrid*, 108 Idaho 736, 702 P.2d 308 (Ct. App. 1985).

It is clear that incest, as defined by § 18-6602, includes the element of a familial relationship between the defendant and the victim, which element is not present in or necessary to the commission of rape under any subdivision of this section; since the crime of incest contains an element which is not necessary to the crime of rape, incest is not a lesser included offense of rape under the traditional statutory approach to lesser included offenses. *State v. Madrid*, 108 Idaho 736, 702 P.2d 308 (Ct. App. 1985).

Included Offense.

Acts leading to statutory rape — sexual intercourse with a female child — would evince an intent necessary to invoke the lewd conduct statute and, accordingly, lewd conduct is an included offense of statutory rape. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Assault with a deadly weapon is not "necessarily committed" in the commission of attempted rape, because attempted rape is not always committed with a deadly weapon nor is attempted rape necessarily committed in an assault with a deadly weapon, because such an assault is not always committed with an intent to rape; thus, where neither crime was alleged in the prosecutor's information to be the means or an element of the commission of the other, assault with a deadly weapon was not an included offense of the attempted rape. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Information.

Information, which charged that act of rape was committed "forcibly" and by threats of great and immediate bodily harm accompanied by the apparent power of execution and against the consent of the prosecutrix, and that she "did then and there resist the accomplishment of said act *** but her resistance

was then and there overcome by force and violence ***," charged but one offense. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Information, which charged defendant with committing lewd and lascivious acts on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and of said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant under former § 18-6607 (now § 18-1508), to wit, lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Charge of lewd and lascivious conduct on body of female child under age of 16 does not necessarily include assault with intent to rape, but charge of assault with intent to rape minor child does include charge of lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1958).

If an offense is "included" in the crime charged, a defendant may be fairly said to have constructive notice of the alleged conduct comprising it and such notice is not defeated by the fact that the included offense may carry a heavy penalty; accordingly, information charging statutory rape of a 12-year-old girl furnished constructive notice to defendant that he might be convicted of lewd conduct as an included offense. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Where an information charging rape included the essential elements that defendant accomplished an act of sexual intercourse with the complaining witness, a female, that was not his wife, and that he did so against her will, and where it also set forth facts indicating that the complaining witness attempted to resist but that her attempt was thwarted by fear that the defendant would hurt her, under the liberal rules of interpretation which are to be applied here, these allegations give rise to an inference that defendant used force or threats to overcome resistance, and the element of "lack of consent" necessary to allege a violation of this section can be found in the language of the information. *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991).

In prosecution for rape, although the one count information was defective because it did not expressly allege that the victim resisted but her resistance was overcome by force or violence, an element of the offense defined by this section, even though a well-

drafted information charging a violation of this section should include allegations that the victim resisted, and that her resistance was overcome by force or violence, the omission of the allegations was not fatal where there was evidence that the act was accomplished with great force carrying an obvious implication that the act was done without victim's consent and over her resistance. *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995).

—Amendment.

Where the defendant in a rape prosecution had been aware of the victim's age before the filing, one day prior to trial, of an amended information alleging statutory rape and he did not make a claim that he could have disputed her age, the defendant's rights were not prejudiced from the amendment, and therefore, there was no abuse of discretion. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

Defendant charged with rape by means of force was not unfairly prejudiced by amendment of information to include the phrase "of the age of 15" following the victim's name before the closing of the state's case-in-chief where defendant had knowledge of the victim's age, where the court offered to permit recall of the complaining witness, and where defendant was unable to specify how the amendment materially impaired his defense. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

In trial for rape by means of force court did not err in denying defendant's motion for continuance made after amendment of information by addition of the phrase "of the age of 15 years" following the victim's name before the closing of state's case-in-chief since defendant was not unfairly prejudiced by such amendment since he had knowledge of victim's age and court offered to permit recall of complaining witnesses. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

Since each circumstance in this section merely describes an alternative element of the crime of rape, or nonconsensual sexual intercourse, for the purpose of subsection (e) I.C.R. 7 amendment to information to include the phrase "of the age of 15 years" following the victim's name did not charge defendant with an additional or different offense. *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987).

Giving the amended information a fair and reasonable construction, and by construing the document liberally in favor of its validity, it was held that the language charging defendant with attempted rape was not so defective as to fail to inform him of the element of intent to commit rape which was essential to the crime charged; as a result, the decisions of

the district court denying defendant's motions to dismiss the amended information were upheld. *State v. Leach*, 126 Idaho 977, 895 P.2d 578 (Ct. App. 1995).

Instructions.

The court's failure to instruct the jury in a statutory rape prosecution that the testimony of prosecutrix relating to previous acts of intercourse between her and the defendant was admissible for the limited purpose of establishing relationship between the parties could not be assigned as error where the defendant had not requested such an instruction. *State v. Gee*, 93 Idaho 636, 470 P.2d 296 (1970).

In a rape prosecution the trial court was not required to give an instruction on the duty of the jury to judge the credibility of witnesses or to give instructions on the included offenses of simple assault and battery or assault with intent to commit rape, in the absence of defendant's request for these instructions at trial. *State v. Kraft*, 96 Idaho 901, 539 P.2d 254 (1975), appeal dismissed, 99 Idaho 214, 579 P.2d 1197 (1978).

In prosecution for statutory rape, where lay persons unfamiliar with the underlying statutes reasonably might have interpreted the repeated references to "lesser" offenses, injury instructions, as signifying that each of the offenses listed, including lewd conduct, was less serious than the crime charged and, moreover, reasonable jurors — noting the sequence of the offenses listed and judge's statement that the crimes were different in "degree" — well could have believed that lewd conduct was the least serious of the "lesser" crimes, the jury instruction erroneously characterized the seriousness of lewd conduct in relation to the crime charged and to other included offenses. However, the error in the instruction, relating to the seriousness of the offense, did not alter the jury's choice of the crime committed and, therefore, it was harmless beyond a reasonable doubt. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

In prosecution for rape and lewd and lascivious conduct with a minor, the defendant's proposed instruction that the charge made against the defendant was easily made, hard to prove, and harder to defend against was improper. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Where, with regard to the jury instructions in a rape prosecution, where the definitions of rape were taken verbatim from this section, the additional instructions suggested by defendant were not necessary, and the instructions given were sufficient to inform the jury of the law applicable to their determination of innocence or guilt. *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991).

In view of the jury instructions given, which adequately apprised the jury of the elements that must be proved in order to convict for rape, the Court of Appeals concluded that the inclusion of "fear" and "fearful" language in the information, which did not relate to elements of the crime, was harmless. *State v. Headlee*, 121 Idaho 979, 829 P.2d 869 (Ct. App. 1992).

The court admitted the photographs of victim's bruises subject to a motion to strike if the state failed to later connect it up with victim's testimony. Later, victim testified and the state asked the court to instruct the jury to consider the bruises as being caused by defendant. The Idaho Court of Appeals found the court's instruction on the admissibility of the photographs entirely neutral. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Where defendant was convicted of rape and asserted on appeal that the use of the accessory liability instruction deprived him of due process, for it allowed the jury to consider whether he was guilty of either of two offenses when only one offense had been charged by the information, the court erred in giving such instruction. *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995).

Where general verdict form was used, asking the jury only whether defendant was guilty of "the charge of rape," the verdict did not reveal whether all the jurors found him guilty of the same act of rape or whether their verdict was unanimous only in that each juror found him guilty of one or the other of the two rapes and defendant was thus deprived of due process when the state, having charged the commission of only one offense in the information, advanced charges of two distinct crimes through instructions given to the jury. *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995).

Intent.

Statutory rape requires only a general criminal intent to prove a violation. *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220 (1990).

Statutory rape is not a crime requiring proof of specific intent to have intercourse with a female under the age of 18 years. *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220 (1990).

Although the jury found that defendant did not commit rape, there was substantial evidence from which the jury could have found that he intended to commit rape. *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991).

Rape, performed by overcoming the resistance of the victim by force or violence, is not a specific intent crime, thus defendant was not entitled to jury instruction that voluntary intoxication may negate an element of specific intent. *State v. Lopez*, 126 Idaho 831, 892 P.2d 898 (Ct. App. 1995).

Defendant's conviction of first degree kidnapping was proper where there was substantial competent evidence upon which the jury could rely in determining that defendant possessed the intent to rape the victim at the time he committed the kidnapping. *State v. Norton*, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000).

Legislative Purpose.

The prevention of illegitimate teenage pregnancies is one of the objectives behind this section and the state has a strong interest in furthering this important governmental objective. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

Lesser Included Offenses.

Battery with intent to commit rape is a lesser included offense of forcible rape. *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991).

Marital Status.

Under Idaho's current statutory scheme relating to rape, nonmarriage is not an essential element of the crime of rape; rather, the existence of a marital status between the victim and the accused is an affirmative defense which must be placed in issue by the accused. *State v. Huggins*, 105 Idaho 43, 665 P.2d 1053 (1983).

Prior Offenses.

Testimony of prior assault by defendant upon prosecutrix, in no way connected with offense for which defendant is being tried, was not admissible. *State v. Garney*, 45 Idaho 768, 265 P. 668 (1928).

It was reversible error, in prosecution for rape, to allow the state to prove that accused was guilty of other offenses of a different character in no way related to the crime charged and it was equally erroneous to allow proof that witnesses for accused were guilty of offenses in no way associated with the crime charged. *State v. Machen*, 56 Idaho 755, 58 P.2d 1246 (1936).

Prosecutorial Misconduct.

It was not prosecutorial misconduct to question the defendant as to the reasonableness of his renting a room at the hotel where rape victim was staying and leaving the room unused, even though the state had said it would not ask for a "flight instruction" for the jury, where the focus of the prosecutor's questioning was not upon the defendant's attempts to flee the scene of the crime, but upon the absurdity of his alibi, and the defendant failed to indicate any way in which this line of questioning prejudiced his case. *State v. Estes*, 111 Idaho 423, 725 P.2d 128 (1986).

Purpose.

The purpose of this section is to protect women with mental disabilities from the

many potential difficulties resulting from non-marital sexual relations. *State v. Soura*, 118 Idaho 232, 796 P.2d 109 (1990).

Question of Fact.

Penetration is an essential element of the crime of rape. The evidence in this case created a factual question regarding penetration, and the district court usurped the function of the jury and made a factual finding that penetration had occurred, thereby removing from the province of the jury a factual finding beyond a reasonable doubt that penetration had occurred, and as such, defendant's rights at trial were violated. *State v. Gittins*, 129 Idaho 54, 921 P.2d 754 (Ct. App. 1996).

Resistance.

Where the complaining witness testified that she did not resist advances of the defendants because she feared for her life, it was error for the court to dismiss rape charges on defendants' motion for acquittal on the ground that elements of the crime had not been proven beyond a reasonable doubt. *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975).

Where defendant, uninvited and unannounced, entered the home of a sleeping woman at night, where he went into her bedroom, and, in the dark, climbed naked into bed with her, where the complaining witness testified that she had never before met defendant, and when she realized he was next to her, she was scared to death and was unable to determine just what he was capable of, and where defendant had intercourse with victim, the evidence adduced at the trial was sufficient to support the conviction under either subsection (3) or subsection (4) of this section. *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991).

In prosecution for rape a reasonable jury could find that the complaining witness was prevented from resisting by threats of harm where defendants made a late-night, uninvited, and unannounced entrance into home while the occupants were asleep and the complaining witness was unaware of their presence and awoke to discover them trying to remove her underwear and she testified that she couldn't think or function, that she was just afraid and where there was great disparity between the size of the witness and the defendants even though complaining witness offered no physical resistance, and the defendants made no spoken threats nor displayed any weapons. *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991).

This section does not require evidence of a spoken threat or a visible display of weaponry to sustain a conviction under subsection (4). *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991).

Reversible Error.

Unnecessary remarks of court while overruling various motions and objections of de-

fendant were not prejudicial where remarks were to a limited extent justified by surrounding circumstances. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Cross-examination of defendant on relations between defendant and his first wife prior to marriage was not reversible error. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Reference by sheriff on direct examination that he had previously investigated another charge of rape against defendant was not reversible error. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Search and Seizure.

Where in a rape prosecution the evidence showed that the defendant's presence at the police station was voluntary, and he in no way limited or conditioned his voluntary appearance, or protested the fingerprinting, and was not forcefully or coercively intimidated from doing so, it could not be said that the defendant's fingerprinting was the result of an illegal detention, and therefore violative of the Fourth Amendment prohibition against illegal searches and seizures. *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

Sentence.

Sentence of 20 years was excessive where evidence did not show aggravation to the extent present in other cases, hence sentence was reduced to five years. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

A defendant who burglarizes a residence, with the intent to commit rape, and then does in fact commit the rape deserves to be punished more severely than a defendant who does not commit the intended act after he has entered the residence. *State v. McCormick*, 100 Idaho 111, 594 P.2d 149 (1979).

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Where defendant, an orderly in a nursing home, was convicted of raping a 77 year-old woman diagnosed as suffering from Alzheimer's disease and defendant stated he saw nothing wrong with his actions, a unified sentence of life with a minimum period of confinement of ten years, was not an abuse of discretion. *State v. Grove*, 120 Idaho 950, 821 P.2d 1005 (Ct. App. 1991).

A unified sentence of eight years in the custody of the Board of Correction, with a minimum period of confinement of forty-two months for rape was reasonable where the victim was a fifteen-year-old girl defendant had met at a party and defendant's prior

record consisted of some misdemeanor charges, two DUIs and a reckless driving charge. *State v. Anderson*, 121 Idaho 534, 826 P.2d 495 (Ct. App. 1992).

Given defendant's prior record as a persistent violator and the reprehensible nature of the offense, the district court did not abuse its discretion by imposing a sentence of thirty years, with a minimum period of thirteen years confinement, for statutory rape. *State v. Spor*, 134 Idaho 315, 1 P.3d 816 (Ct. App. 2000).

State's Burden of Proof.

Even though there is no requirement of corroboration in rape cases under this section, the state must still show under I.C.R. 5 that a crime has been committed and that there is probable cause that defendant committed it, and the court should grant a judgment of acquittal under I.C.R. 29 where the evidence is found insufficient to support a guilty verdict. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Verdicts.

Jury verdicts of guilty on a rape charge and not guilty as to an infamous crime against nature charge are rationally reconcilable and therefore were not impermissibly inconsistent. *State v. Lopez*, 126 Idaho 831, 892 P.2d 898 (Ct. App. 1995).

Victim's Past Sexual Conduct.

District Court did not err by prohibiting inquiry at trial into statutory rape victim's past sexual conduct where defendant sought to show victim's consent since consent is not a defense to statutory rape. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

Where defendant, in prosecution for kidnapping and statutory rape, made no offer to prove a connection between victim's prior sexual conduct and a motive or propensity to fabricate, the victim's prior sexual conduct was not relevant to her general credibility as a witness and the district judge properly refused to allow inquiry into the victim's sexual history. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

The evidence of complaining witness' sexual advances, over a period of several years, toward some of the men she had met in a bar, was not relevant, in itself, to establish that she consented to have sex with defendant. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Voluntariness of Plea.

Where information specifically alleged that defendant "intentionally" attempted to rape the victim, where there was no assertion that defendant was not conversant with the English language nor was he a stranger to the charge of attempted rape, having been previ-

ously convicted of attempted rape and forcible rape, and where details of assault were fully explored at preliminary hearing, the defendant was made aware, before pleading guilty, of evidence the State could offer at trial to prove both the acts and the intent comprising the attempted rape, and the district court did not err in determining that, under both the federal and state standards, pleas of guilty to attempted rape and assault with a deadly weapon were voluntary. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

Collateral References. 65 Am. Jur. 2d, Rape, § 1 et seq.

75 C.J.S., Rape, § 1 et seq.

Compulsory examination of one accused of rape for venereal disease. 2 A.L.R. 1332; 22 A.L.R. 1189.

Presumption and burden of proof as to chastity under statutes making chastity an ingredient of rape. 3 A.L.R. 1462.

Criminal responsibility of one cooperating in offense of rape which he is incapable of committing personally. 5 A.L.R. 785; 74 A.L.R. 1110; 131 A.L.R. 1322.

Marriage subsequent to crime as bar to prosecution for rape. 9 A.L.R. 339.

Directing acquittal for insufficiency of the evidence. 17 A.L.R. 923.

"Infamous offense," rape as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1016.

Competency of prosecutrix as witness in prosecution for rape of feeble-minded female. 26 A.L.R. 1502; 148 A.L.R. 1140.

Reduction of appellate court of punishment imposed by trial court. 29 A.L.R. 333; 89 A.L.R. 295.

Cross-examination of prosecuting witness as to sexual morality. 65 A.L.R. 421.

Assault with intent to ravish consenting female under age of consent. 81 A.L.R. 599.

Rape cases, admissibility in, of evidence of previous acts of unchastity on part of prosecutrix. 140 A.L.R. 364.

Complaint or details of complaint by alleged victim of rape, admissibility of evidence of, as affected by fact that she is not a witness or is incompetent to testify because of age or other reason. 157 A.L.R. 1359.

Blood grouping tests on issue of identity in rape prosecutions. 46 A.L.R.2d 1000.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and a wife. 62 A.L.R.2d 1067.

Pregnancy, admissibility, in non-statutory rape prosecution, of evidence of. 62 A.L.R.2d 1083.

Applicability of rape statute covering children of a specified age, with respect to a child who is past the anniversary date of such age. 73 A.L.R.2d 874.

Incest as included within charge of rape. 76 A.L.R.2d 484.

Cautionary instructions as to evidence of other similar offense. 77 A.L.R.2d 906; 2 A.L.R.4th 330.

Rape by fraud or impersonation. 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape. 8 A.L.R.3d 1100.

Impotency as defense to charge of rape or assault with intent to commit rape. 23 A.L.R.3d 1351.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient. 31 A.L.R.3d 1227.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feeble-minded or an imbecile. 31 A.L.R.3d 1227.

Statutory rape of female who is or has been married. 32 A.L.R.3d 1030.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity. 35 A.L.R.3d 1452.

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 A.L.R.3d 1434.

Recantation by prosecuting witness in sex crime as ground for new trial. 51 A.L.R.3d 907.

What constitutes penetration in prosecu-

tion for rape or statutory rape. 76 A.L.R.3d 163.

Fact that rape victim's complaint or statement was made in response to questions as affecting *res gestae* character. 80 A.L.R.3d 369.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape. 81 A.L.R.3d 1228.

Propriety of publishing identity of sexual assault victim. 40 A.L.R.5th 787.

Criminal responsibility of husband as for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases. 6 A.L.R.4th 1066.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offenses. 31 A.L.R.4th 120.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment. 64 A.L.R.4th 1064.

Defense of mistake of fact as to victim's consent in rape prosecution. 102 A.L.R.5th 447.

18-6102. Proof of physical ability. — No conviction for rape can be had against one who was under the age of fourteen (14) years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt. [I.C., § 18-6102, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6766; C.S., § 8263; I.C.A. § 17-1602 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972,

and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6103. Penetration. — The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime. [I.C., § 18-6103, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 363; R.S., R.C., & C.L., § 6767; C.S., § 8267; I.C.A., § 17-1603 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: State v. Greensweig, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

ANALYSIS

Evidence.

Sufficiency of evidence.

Evidence.

To permit medical testimony, in a trial for rape, as to pain experienced by victim compared with that of a new bride, is reversible

error. *State v. Wilson*, 93 Idaho 194, 457 P.2d 433 (1969).

Sufficiency of Evidence.

This section is not a statement of legislative

intent, but rather, refers to the quantum of evidence necessary to establish that an act of sexual intercourse has occurred. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

18-6104. Punishment for rape. — Rape is punishable by imprisonment in the state prison not less than one (1) year, and the imprisonment may be extended to life in the discretion of the District Judge, who shall pass sentence. [I.C., § 18-6104, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 44; R.S., R.C., & C.L., § 6768; C.S., § 8265; I.C.A., § 17-1604; 1941, ch. 23, § 1, p. 48 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *In re Chase*, 18 Idaho 561, 110 P. 1036 (1910); *In re Setters*, 23 Idaho 270, 128 P. 1111 (1913); *State v. Cornwall*, 95 Idaho 680, 518 P.2d 863 (1974); *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983); *State v. Goodson*, 112 Idaho 935, 736 P.2d 1389 (Ct. App. 1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Carman*, 114 Idaho 791, 760 P.2d 1207 (Ct. App. 1988); *State v. Salter*, 125 Idaho 418, 871 P.2d 835 (Ct. App. 1994); *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995).

ANALYSIS

Construction.

Discretion of court.

Resentencing.

Sentence.

— Excessive.

— Independent of other sentences.

— Maximum.

— Upheld.

Construction.

Provision of section providing for sentence of not less than one year, and that imprisonment may be extended to life at the discretion of the court did not conflict with § 19-2513, which provides that court in imposing sentence for commission of a felony shall sentence offender for an indeterminate period of time, but fixing in such sentence the maximum period of imprisonment. *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1951).

Discretion of Court.

Though defendant had no previous felony record, the trial court did not abuse its discretion in committing defendant for a term of twenty-five years on his plea of guilty to the crime of forcible rape since the sentence was within the statutory limits. *State v. Hawk*, 97 Idaho 1, 539 P.2d 553 (1975).

Where defendant, who had a prior convic-

tion for lewd and lascivious conduct, was convicted after entering pleas of guilty to three counts of statutory rape, the trial court did not abuse its discretion in denying defendant's application for probation and in imposing three consecutive ten-year prison terms. *State v. Mansfield*, 97 Idaho 138, 540 P.2d 800 (1975).

The trial court did not abuse its discretion in denying defendant probation and in imposing a thirty-year sentence for rape conviction and two five-year terms for each conviction of infamous crimes against nature with all terms to be served concurrently. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

Where defendant had a prior criminal record and where defendant made violent threats in the course of the forcible rape, the trial court did not abuse its discretion in sentencing defendant to an indeterminate term not to exceed twelve years. *State v. Lawrence*, 97 Idaho 775, 554 P.2d 953 (1976).

Where the defendant in a statutory rape prosecution had previously received a three-year deferred sentence for possession of dangerous drugs, had been committed to federal authorities for almost two years, had been charged with aggravated assault, robbery and grand auto theft and had a history of assault but no record of convictions, and where defendant was a 27-year-old man and the jury had found that he had intercourse with a 14-year-old girl, the defendant's background as shown in the presentence report was such that the eight-year sentence imposed did not constitute an abuse of discretion and there were no "compelling circumstances" to justify a finding of abuse. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

Where the defendant was given an indeterminate sentence of 15 years following his plea of guilty to a charge of rape, the sentence was not excessive and did not represent an abuse of discretion by the sentencing judge, given the defendant's apparent lack of remorse and given the fact that the defendant would first become eligible for parole in five years. The five years' incarceration was not excessive to accomplish the primary objective of protecting society and the secondary goals of deter-

rence and punishment mentioned by the sentencing judge. *State v. Moore*, 104 Idaho 226, 657 P.2d 1094 (Ct. App. 1983).

An indeterminate sentence of 30 years imposed upon a defendant convicted of rape was within the statutory limits and would not be disturbed on appeal where the defendant failed to show that the sentence was a clear abuse of discretion. The test for showing a clear abuse of discretion is whether a term of actual confinement exceeds that necessary to protect society, and to achieve the related goals of deterrence, rehabilitation or retribution, under any reasonable view of the facts of a given case. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

An indeterminate sentence of 30 years imposed upon defendant convicted of rape was not unduly harsh and was not an abuse of the court's discretion, where the defendant would be eligible for review for parole after serving five years of his sentence, and where the record showed that the factors considered by the sentencing judge included the defendant's eligibility for parole before his thirtieth birthday; his apparent lack of remorse or repentance for the crime; society's need for protection; the fact that probation was not feasible or practical; the deterrence to others; the fact that there was no provocation for the crime; and the fact that, in undertaking the crime, the defendant had impersonated a peace officer. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

In prosecution for attempted rape of a child, where the investigation disclosed that defendant, who was 22 years old when sentenced, had prior convictions for a burglary and two petit larcenies and also had a history of unlawful use and distribution of drugs and alcohol, the imposition of a ten-year indeterminate sentence did not represent an abuse of discretion and the district judge did not abuse his discretion by refusing to retain jurisdiction under § 19-2601 4. *State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), *aff'd*, 106 Idaho 665, 682 P.2d 618 (1984).

Where the record showed that when fixed term, 20-year sentence was imposed on the defendant for rape, the district judge indicated that he had considered the protection of society his primary responsibility in the case, but that he had also considered the circumstances surrounding the case, the defendant's prior record (including rape and kidnapping) and the possibility of the defendant's rehabilitation (before committing this rape he had already undergone treatment as a sexual psychopath), the sentence did not constitute an abuse of discretion. *State v. Swain*, 105 Idaho 743, 672 P.2d 1073 (Ct. App. 1983).

Concurrent indeterminate sentences of 20 years for rape, 15 years for burglary and five years for crime against nature were not un-

duly harsh and were not an abuse of discretion. *State v. Mahoney*, 107 Idaho 190, 687 P.2d 580 (Ct. App. 1984).

An indeterminate life sentence was not an abuse of the trial court's discretion where the defendant entered the victim's home armed with a knife and directed her to perform fellatio and to have intercourse with him, and although the defendant was only 17 years old at the time of this offense, he had compiled a substantial prior record, including auto theft, burglary, and drug abuse, and had been confined in the closed unit of a juvenile rehabilitation center in Alaska due to assaultive behavior. *State v. Lute*, 108 Idaho 905, 702 P.2d 1365 (Ct. App. 1985).

Absent a clear abuse of discretion, a sentence within the statutory maximum will not be disturbed. *State v. Lute*, 108 Idaho 905, 702 P.2d 1365 (Ct. App. 1985).

Resentencing.

The trial court did not violate the defendant's due process rights in resentencing the defendant to a 20-year indeterminate sentence, after the court realized that the original sentence of an eight-year fixed term that it had earlier imposed was illegal, where the record did not demonstrate any vindictiveness on the part of the court in resentencing the defendant, and where considering the fact that the defendant would be eligible for parole after one-third of the sentence, the new sentence of a 20-year indeterminate term was the equivalent of the original eight-year fixed term. *State v. Hoisington*, 105 Idaho 660, 671 P.2d 1362 (Ct. App. 1983).

Sentence.

—Excessive.

Fact that sentence for conviction for rape was excessive does not constitute ground for motion for new trial. *State v. Alvord*, 47 Idaho 162, 272 P. 1010 (1928).

Sentence of 20 years was excessive where evidence did not show aggravation to the extent present in other cases, hence sentence was reduced to five years. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

A sentence of 30 years' imprisonment for lewdly and lasciviously having intercourse with a female child 14 years of age (his own daughter) was determined to be extreme on appeal and an abuse of discretion on the part of the trial judge arising out of passion and prejudice, upon a review of the record, showing defendant to be a person in need of psychiatric treatment rather than imprisonment. *State v. Ledbetter*, 83 Idaho 451, 364 P.2d 171 (1961).

Indeterminate sentence of 30 years for rape would be reduced to 25 years where crime was

defendant's first felony and the lesser sentence would serve the court's stated objectives of protection of society and punishment of defendant. *State v. Martinez*, 105 Idaho 841, 673 P.2d 441 (Ct. App. 1983).

District court abused its discretion by arriving at an unreasonably harsh sentencing structure of incarceration for sixty years without the possibility of parole for defendant's crimes of rape, forcible sexual penetration with a foreign object and robbery; totality of sentences was more than reasonably necessary to accomplish sentencing goals. Consecutive 25-year determinate terms modified to be served concurrently and consecutive 10-year determinate term for robbery modified to be made indeterminate. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

—Independent of Other Sentences.

Only if a sequence of events is established that separates acts of lewd conduct from those of rape may the defendant be sentenced separately for lewd conduct. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

—Maximum.

Warden could not hold prisoner for longer than one year for conviction of rape, where court in fixing maximum sentence set same for a period of not more than one year, since legislature in enacting this section, gave the district court discretion in setting maximum sentence by providing that sentence could be extended for life at discretion of the trial court. *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1951).

—Upheld.

Where the defendant was sentenced to indeterminate, concurrent periods not to exceed 15 years for rape and five years for the infamous crime against nature, the trial court did not abuse its sentencing discretion, where the court found that the positive qualities of the offender were outweighed by the retribution and general deterrence objectives of sentencing. *State v. Hendricks*, 110 Idaho 846, 718 P.2d 1284 (Ct. App. 1986).

Where the defendants raped and sodomized a 12-year-old girl, the fixed 30-year sentence for rape, fixed 30-year sentence for lewd conduct with a minor, fixed 15-year sentence for aggravated battery, and the indeterminate 25-year sentence for second degree kidnapping were not an abuse of discretion. *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986).

Where the defendant picked up his victim, a young mother who needed a ride, and abducted her by force and took her to a remote area where he then raped her, concurrent sentences of 15 years for kidnapping in the first degree, ten years for assault with intent to commit a serious felony, five years for the infamous crime against nature, and 18 years

for rape were not unduly harsh even in light of the defendant's lack of criminal record. *State v. Talley*, 114 Idaho 898, 761 P.2d 1250 (Ct. App. 1988).

Where defendant entered the victim's home through a bedroom window, hid in a closet, jumped out wielding a large hunting knife, then proceeded to choke, strike and rape the victim, and following the rape, he threatened and choked the victim again, a term of 15 years, with a five-year minimum term of confinement, was not excessive with regard to defendant's conviction for first degree burglary and a life term with a ten-year minimum confinement period was not excessive with regard to his conviction for rape. *State v. Parker*, 117 Idaho 527, 789 P.2d 523 (Ct. App. 1990).

Where attorney for defendant charged with kidnapping and raping a 15-year-old girl stated twice before the district judge that the recommended sentences were appropriate given the plea negotiations entered into by defendant, where the district judge took time to question defendant about the reasonableness of his plea, where the plea of guilty was conditional in the sense that the judge was bound not to impose a sentence which exceeded the prosecutor's recommendation, where defendant agreed to the recommendation, as shown by the statements of his counsel, and where defendant was told that if the court determined the recommended sentence to be inappropriate, the court would permit defendant to withdraw his guilty plea, defendant was in a poor situation to question the length of his negotiated sentences for rape and kidnapping in the second degree where he received concurrent unified sentences of 20 years, each with a five-year minimum period of confinement. *State v. Leyva*, 117 Idaho 462, 788 P.2d 863 (Ct. App. 1990).

Four-year fixed sentence for rape was not unreasonable and judge properly considered that defendant's relationship with victim was consensual, she was a very willing participant in the sexual relationship, her parents knew of the friendship, she had turned 16 years old by the time defendant's probation was revoked and the sentences for assault and statutory rape were ordered into effect, defendant loved victim when the two were having intercourse, that victim instigated a good share of what happened, and that defendant was less mature than an average man his age. *State v. Adams*, 120 Idaho 350, 815 P.2d 1090 (Ct. App. 1991).

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Where defendant, an orderly in a nursing home, was convicted of raping a 77 year-old

woman diagnosed as suffering from Alzheimer's disease and defendant stated he saw nothing wrong with his actions, a unified sentence of life with a minimum period of confinement of ten years, was not an abuse of discretion. *State v. Grove*, 120 Idaho 950, 821 P.2d 1005 (Ct. App. 1991).

A unified sentence of eight years in the custody of the Board of Correction, with a minimum period of confinement of forty-two months for rape was reasonable where the victim was a fifteen-year-old girl defendant had met at a party and defendant's prior record consisted of some misdemeanor charges, two DUIs and a reckless driving charge. *State v. Anderson*, 121 Idaho 534, 826 P.2d 495 (Ct. App. 1992).

Concurrent unified sentences of life in prison with a minimum period of confinement of 20 years for rape and robbery was not an abuse of court's discretion where defendant had a long history of encounters with the law, including four felony convictions, and was on parole when he committed the latest offenses. *State v. Zacharias*, 122 Idaho 227, 832 P.2d 1168 (Ct. App. 1992).

A sentence of a minimum period of confinement of eight years for conviction of rape,

burglary, kidnapping and the infamous crime against nature was not unreasonable where defendant was on probation at the time he committed the crimes, he violated a restraining order and had a prior criminal record. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

The judgments of conviction for two counts of rape and one count of lewd conduct with a minor, including the imposition of three concurrent life sentences with a mandatory period of fifteen years' incarceration was not unreasonable where defendant, a forty-one year old teacher, pled guilty to having sexual intercourse with three female students, all of whom became pregnant. *State v. Campbell*, 123 Idaho 922, 854 P.2d 265 (Ct. App. 1993).

A former police officer's sentence of 32 years with 12 years fixed was affirmed where the sentencing court was aware of his age and lack of a prior criminal record, but concluded that the sentence was necessary to effectuate the protection of society from a defendant who had abused his position of trust, was in complete denial of his violent actions, and who was a high risk to reoffend. *State v. Andrews*, 133 Idaho 893, 994 P.2d 636 (Ct. App. 2000).

18-6105. Evidence of previous sexual conduct of prosecuting witness. — In prosecutions for the crime of rape, evidence of the prosecuting witness' previous sexual conduct shall not be admitted nor reference made thereto in the presence of the jury, except as provided hereinafter. The defendant may make application to the court before or during the trial for the admission of evidence concerning the previous sexual conduct of the prosecuting witness. Upon such application the court shall conduct a hearing out of the presence of the jury as to the relevancy of such evidence of previous sexual conduct and shall limit the questioning and control the admission and exclusion of evidence upon trial. Nothing in this section shall limit the right of either the state or the accused to impeach credibility by the showing of prior felony convictions. [I.C., § 18-6105, as added by 1977, ch. 208, § 2, p. 573.]

Compiler's notes. Section 1 of S.L. 1977, ch. 208 is compiled as § 18-6101.

Cited in: *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982).

ANALYSIS

- Admissibility.
- Consent.
- Construction.
- Credibility of victim.
- Counsel.
- Kidnapping.
- Statutory rape.

Admissibility.

Evidence of prior sexual conduct of the prosecuting witness is admissible only if the

court conducts a relevancy hearing out of the presence of the jury. *State v. Winkler*, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987).

Consent.

In a rape case in which the defense was consent, the 14-year-old victim's statement to a third party of her belief that she was pregnant was relevant, as a matter of law, on the charge of forcible rape and should not have been summarily excluded. *State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986).

In rape cases where the defense is consent, evidence of prior unchastity may be relevant and material under this section on the issue of consent. *State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986).

Construction.

This section was not intended to allow defense counsel to conduct a "fishing expedition" into the prior sexual conduct of the victim, even outside the presence of a jury. *State v. Gabrielson*, 109 Idaho 507, 708 P.2d 912 (Ct. App. 1985).

The statutory requirement of a judicial inquiry into the relevancy of evidence of prior sexual conduct is a legislative recognition that where the defendant denies ever having had intercourse with the prosecutrix, evidence of her prior unchastity is immaterial since it is relevant to consent, and consent would not be in issue in such a case. *State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986).

Credibility of Victim.

Where defendant, in prosecution for kidnapping and statutory rape, made no offer to prove a connection between victim's prior sexual conduct and a motive or propensity to fabricate, the victim's prior sexual conduct was not relevant to her general credibility as a witness and the district judge properly refused to allow inquiry into the victim's sexual history. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

Counsel.

In prosecution for rape, the defense attor-

ney's failure to investigate the victim's prior sexual contacts did not constitute inadequacy of counsel and the defendant failed to show prejudice in the light of all the other evidence corroborating the victim's testimony. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

Kidnapping.

In prosecution for kidnapping and rape of a minor, inquiry into victim's past sexual conduct was impermissible since mere unchastity does not support an inference of consent to being kept or detained within the meaning of the kidnapping statute and since defendant did not offer to prove that the victim had engaged in past conduct manifesting a pattern of voluntary encounters with men under similar circumstances. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

Statutory Rape.

District Court did not err by prohibiting inquiry at trial into statutory rape victim's past sexual conduct where defendant sought to show victim's consent since consent is not a defense to statutory rape. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

18-6106. Restitution to victim. — Persons convicted of offenses covered under this chapter may be ordered by the court to provide restitution to the victim for specific costs incurred by the victim as a result of injury or loss caused by the criminal act. [I.C., § 18-6106, as added by 1977, ch. 208, § 3, p. 573.]

Cited in: *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982).

18-6107. Rape of spouse. — No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3. and 4. of section 18-6101, Idaho Code. [I.C., § 18-6107, as added by 1977, ch. 208, § 4, p. 573; am. 1989, ch. 351, § 1, p. 879.]

ANALYSIS

Burden of proof.
Element of crime.

Burden of Proof.

The state in a prosecution for rape or assault with intent to commit rape, has the burden of alleging and proving either (a) the absence of a marriage between the defendant and the alleged victim or (b) the presence of special circumstances delineated by statute under which a husband may be prosecuted for the actual or attempted rape of his wife. *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct.

App. 1982), modified, 105 Idaho 43, 665 P.2d 1053 (1983).

Element of Crime.

The language "no person shall be convicted of rape for any act or acts with that person's spouse" is an integral part of the definition of the crime of rape and the fact that the legislature removed comparable language from § 18-6101 and substituted the quoted language in this section does not indicate any legislative intent to shift the burden of proof nor does it indicate an intent to eliminate an element from the crime of rape. The element, lack of marriage, is still present, with the two

enumerated exceptions. *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982), modified, 105 Idaho 43, 665 P.2d 1053 (1983).

Under Idaho's current statutory scheme relating to rape, nonmarriage is not an essential element of the crime of rape; rather, the

existence of a marital status between the victim and the accused is an affirmative defense which must be placed in issue by the accused. *State v. Huggins*, 105 Idaho 43, 665 P.2d 1053 (1983).

18-6108. Male rape. — Male rape is defined as the penetration, however slight, of the oral or anal opening of another male, with the perpetrator's penis, for the purpose of sexual arousal, gratification or abuse, under any of the following circumstances:

1. Where the victim is incapable, through any unsoundness of mind, whether temporary or permanent, of giving consent.

2. Where the victim resists but his resistance is overcome by force or violence.

3. Where the victim is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution.

4. Where the victim is prevented from resistance by the use of any intoxicating, narcotic, or anaesthetic substance administered by or with the privity of the accused.

5. Where the victim is at the time unconscious of the nature of the act, and this is known to the accused. [I.C., § 18-6108, as added by 1990, ch. 291, § 2, p. 811; am. 1993, ch. 263, § 1, p. 895; am. 1994, ch. 135, § 2, p. 307.]

Compiler's notes. Former § 18-6108, which comprised I.C., § 18-6108, as added by 1989, ch. 46, § 1, p. 60, was repealed by S.L. 1990, ch. 291, § 1.

Section 1 of S.L. 1994, ch. 135 is compiled as § 18-6101.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-8303, 18-8304, 18-8314, 19-401, 19-402, 19-5307, 20-525A, 33-1208, 39-1113 and 72-1025.

Cited in: *State v. Hayes*, 123 Idaho 26, 843 P.2d 675 (Ct. App. 1992).

Admissibility.

A statement by defendant, who was charged with male rape, regarding his release from prison was admissible because it was probative of an element of male rape, and it had the likely effect of intimidating and threatening the victim so that he would not resist. *State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995).

18-6109. Punishment for male rape. — Male rape is punishable by imprisonment in the state prison for not less than one (1) year, and the imprisonment may be extended to life. [I.C., § 18-6109, as added by 1993, ch. 263, § 2, p. 895.]

Compiler's notes. Section 3 of S.L. 1993, ch. 263 declared an emergency. Approved March 29, 1993.

18-6110. Sexual contact with a prisoner. — It is a felony for any officer, employee or agent of a state, local or private correctional facility, as those terms are defined in section 18-101A, Idaho Code, to have sexual contact with a prisoner, whether an in-state or out-of-state prisoner, as those terms are defined in section 18-101A, Idaho Code, housed in such facility. For the purposes of this section "sexual contact" means sexual intercourse, genital-genital, manual-anal, manual-genital, oral-genital, anal-genital or oral-anal, between persons of the same or opposite sex.

Any person found guilty of sexual contact with a prisoner is punishable by imprisonment in the state prison for a term not to exceed life. [I.C., § 18-6110, as added by 1993, ch. 222, § 1, p. 759; am. 2000, ch. 272, § 9, p. 786; am. 2003, ch. 37, § 1, p. 156.]

Compiler's notes. Sections 8 and 10 of S.L. 2000, ch. 272 are compiled as §§ 18-2510 and 20-805, respectively.

Section 14 of S.L. 2000, ch. 272 declared an

emergency. Approved April 12, 2000.

Section 2 of S.L. 2003, ch. 37 declared an emergency. Approved March 11, 2003.

CHAPTER 62

RELIGIOUS MEETINGS — SUNDAY REST

SECTION.

18-6201 — 18-6204. [Repealed.]

18-6201, 18-6202. Disturbing religious meetings — Sunday rest. [Repealed.]

Compiler's notes. Former § 18-6201, which comprised I.C., § 18-6201, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-6201, which comprised Cr. & P. 1864, § 123; R.S., R.C., & C.L., § 6820; C.S., § 8290; I.C.A., § 17-2501 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Former § 18-6202, which comprised I.C., § 18-6202, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-6202, which comprised S.L. 1907, p. 223, § 1; reen. R.C. & C.L., § 6823; C.S., § 8291; I.C.A., § 17-2502 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-6203. Public amusements — Local option procedure — Penalties. [Repealed.]

Compiler's notes. Former § 18-6203 which comprised I.C., § 18-6203 as added by S.L. 1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 13, effective April 1, 1972.

Another former § 18-6203 which comprised S.L. 1907, p. 223, § 3; am. R.C., § 6825; am.

S.L. 1911, ch. 99, p. 342; compiled and ren. C.L., § 6825; C.S., § 8293; am. S.L. 1921, ch. 238, § 1, p. 529; I.C.A., § 17-2504; am. S.L. 1941, ch. 86, § 1, p. 159; am. S.L. 1957, ch. 109, § 1, p. 187, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-6204. Disposal of fines. [Repealed.]

Compiler's notes. Former § 18-6204, which comprised I.C., § 18-6204, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-6204, which com-

prised S.L. 1907, p. 223, § 6; R.C. & C.L., § 6828; C.S., § 8296; I.C.A., § 17-2507; 1939, ch. 7, § 2, p. 21 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

CHAPTER 63

REVENUE AND TAXATION

SECTION.

18-6301. Taxation — Refusal to give assessor list of property.

18-6302. Use of illegal receipts.

18-6303. Unlawful possession of blank licenses or poll tax receipts.

SECTION.

18-6304. Refusal to give tax collector names of employees.

18-6305. Doing business without license.

18-6306. Tax collector — Neglect of duty.

18-6307. Auditor — Neglect of duty.

SECTION.

18-6308. Violation of revenue laws.

18-6309. Impersonation of revenue officer.

18-6301. Taxation — Refusal to give assessor list of property. —

Every person who unlawfully refuses upon demand to give to any county assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name, or fraudulently refuses to give his true name, to any assessor when demanded by such assessor in the discharge of his official duties, is guilty of a misdemeanor. [I.C., § 18-6301, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1875, p. 475, § 68; R.S., R.C., & C.L., § 6779; C.S., § 8383; I.C.A., § 17-3205 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. 71, 72 Am. Jur. 2d, State and Local Taxation, § 1 et seq.

84, 85 C.J.S., Taxation, § 1 et seq.

Practice of law, rendition of services in connection with tax matters as. 9 A.L.R.2d 797.

Declaratory judgment, tax questions as proper subject of action for. 11 A.L.R.2d 359.

Property destined for removal from state as subject to taxation therein. 11 A.L.R.2d 938.

Validity of municipal ordinance imposing income tax or license upon non-residents employed in taxing jurisdiction. 48 A.L.R.3d 343.

Situs of aircraft, rolling stock, and vessels for purposes of property taxation. 3 A.L.R.4th 837.

18-6302. Use of illegal receipts. — Every person who uses or gives any receipt except that prescribed by law, as evidence of the payment of any poll tax, road tax or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, or who inserts the name of more than one (1) person therein, is guilty of a misdemeanor. [I.C., § 18-6302, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1875, p. 475, §§ 61, 65; R.S., R.C., & C.L., § 6980; C.S., § 8383a; I.C.A., § 17-3206 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336,

§ 1 in the same words as the section prior to its repeal.

Cross ref. Official receipts are prescribed by the state auditor, § 67-1004.

Penalty for misdemeanor when not otherwise provided, § 18-113.

18-6303. Unlawful possession of blank licenses or poll tax receipts. — Every person who has in his possession with intent to circulate or sell, any blank licenses or poll tax receipts other than those furnished by the proper officer, is guilty of felony. [I.C., § 18-6303, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1875, p. 475, § 83; R.S., R.C., & C.L., § 6981; C.S., § 8383b, I.C.A., § 17-3207 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

18-6304. Refusal to give tax collector names of employees. — Every person who, when requested by the collector of taxes or licenses,

refuses to give to such collector the name and residence of each man in his employment, or to give such collector access to the building or place where such men are employed, is guilty of a misdemeanor. [I.C., § 18-6304, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1875, p. 475, § 66; R.S., R.C., & C.L., § 6982; C.S., § 8384; I.C.A., § 17-3208 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-6305. Doing business without license. — Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor. [I.C., § 18-6305, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1871, p. 21, § 150; R.S., R.C., & C.L., § 6983; C.S., § 8385; I.C.A., § 17-3209 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho 376, 49 P. 314, 37 L.R.A. 509, 95 Am. St. R. 186 (1897).

ANALYSIS

Civil and criminal liability.

Validity of contracts.

Civil and Criminal Liability.

Where license must be procured before commencement of business or occupation liable to pay license tax, person operating without license is not only liable for tax but may also be prosecuted criminally. *Bingham County v. Fidelity & Deposit Co.*, 13 Idaho 34, 88 P. 829 (1907).

License tax is required to be paid before a person commences business. Tax is not imposed as penalty, but is a debt due county or state for doing or conducting the business. Penalty for doing such business without a license is made a misdemeanor. *State v. Wall*, 18 Idaho 300, 109 P. 724 (1910).

Validity of Contracts.

To the general rule that an act in violation of a statute forbidding it is void, there is an exception when statute is for protection of public revenue, does not make the act itself void, and the act is not malum in se nor detrimental to good morals. *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho 376, 49 P. 314, 37 L.R.A. 509, 95 Am. St. R. 186 (1897).

Where statute prescribes a license as requisite to engaging in business, which is for protection of public and not for revenue only, a contract in violation thereof is invalid and there can be no recovery thereon. *Zimmerman v. Brown*, 30 Idaho 640, 166 P. 924 (1917).

18-6306. Tax collector — Neglect of duty. — If any tax collector or his deputy wilfully neglects or refuses to perform any of the duties enjoined on him by the provisions of title 63 of Idaho Code he is guilty of a misdemeanor in office, and shall be punished by imprisonment in the county jail not more than one (1) year, or by a fine of not less than \$200 nor more than \$1,000, or by both such fine and imprisonment, and shall be forthwith removed from office. [I.C., § 18-6306, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1864, p. 334, § 26; R.S., R.C. & C.L., § 6984; C.S., § 8386; I.C.A., § 17-3210 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6307. Auditor — Neglect of duty. — If any county auditor neglects or refuses to perform the duties enjoined on him by the provisions of title 63 of the Idaho Code he is guilty of a felony, and shall be punished by imprisonment in the state prison for not more than one (1) year, or by a fine of not less than \$200 nor more than \$1,000, or by both such fine and imprisonment, and shall be forthwith removed from office. [I.C., § 18-6307, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1864, p. 334, § 74; R.S., R.C., & C.L., § 6985; C.S., § 8387; I.C.A., § 17-3211 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6308. Violation of revenue laws. — Any officer who, at the same time, performs the duties of any two officers, in any manner connected with the public revenue, except in the manner expressly provided by law, or any collecting or disbursing officer who refuses or neglects the performance of the duties required of him by the title, Revenue, of the Idaho Code, is guilty of a felony, and on conviction thereof must be punished by imprisonment in the state prison for not more than one (1) year, or by a fine of not less than \$200 nor more than \$1,000, or by both such fine and imprisonment, and must forthwith be removed from office. [I.C., § 18-6308, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1875, p. 475, § 99; R.S., R.C., & C.L., § 6392; C.S., § 8130; I.C.A., § 17-513 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The reference in this section to "the title, Revenue, of the Idaho Code" refers to Title 63 of the Idaho Code which is entitled "Revenue and Taxation".

18-6309. Impersonation of revenue officer. — Any person who shall in this state unlawfully exercise or attempt to exercise the functions of, or hold himself out as, an officer, agent, deputy or employee of the state tax commission or of any county assessor shall be guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state prison for a period of not more than five (5) years or by a fine of not more than five thousand dollars (\$5,000) or by both such fine and imprisonment. [I.C., § 18-6309, as added by 1981, ch. 72, § 1, p. 104.]

CHAPTER 64

RIOT, ROUT, UNLAWFUL ASSEMBLY, PRIZE FIGHTING, DISTURBING PEACE

- SECTION.
- 18-6401. Riot defined.
 - 18-6402. Riot — Felony — Misdemeanor — Punishment.
 - 18-6403. [Repealed.]
 - 18-6404. Unlawful assembly defined.

- SECTION.
- 18-6405. Punishment for unlawful assembly.
 - 18-6406 — 18-6408. [Repealed.]
 - 18-6409. Disturbing the peace.
 - 18-6410. Assembly to disturb peace — Refusal to disperse.

18-6401. Riot defined. — Any action, use of force or violence, or threat thereof, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two (2) or more persons acting together, and without authority of law, which results in:

- (a) physical injury to any person; or
- (b) damage or destruction to public or private property; or
- (c) a disturbance of the public peace;

is a riot. [I.C., § 18-6401, as added by 1972, ch. 336, § 1, p. 844; am. 1981, ch. 123, § 1, p. 211.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 122; R.S., R.C., & C.L., § 6950; C.S., § 8364; I.C.A., § 17-3001 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Collateral References. 12 Am. Jur. 2d,

Breach of Peace and Disorderly Conduct, § 1 et seq.

27 C.J.S., Disorderly Conduct, § 1 et seq.

77 C.J.S., Riot, § 1 et seq.

General discussion. 49 A.L.R. 1135.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct. 12 A.L.R.3d 1448.

18-6402. Riot — Felony — Misdemeanor — Punishment. — (1) A riot is a felony if:

(a) It occurs on or about the state penitentiary, a county or city jail, or any other penal facility in this state, or it involves the taking of one or more hostages. Violation of the provisions of this subsection is punishable by imprisonment in the state penitentiary for not less than five (5) years, no [nor] more than twenty (20) years or a fine not to exceed twenty-five thousand dollars (\$25,000), or both such fine and imprisonment.

(b) The destruction or damage to public or private property exceeds five hundred dollars (\$500). Violation of the provisions of this subsection is punishable by imprisonment in the state penitentiary for not more than five (5) years or a fine not to exceed ten thousand dollars (\$10,000), or both such fine and imprisonment.

(2) A riot is a misdemeanor in all other circumstances punishable by imprisonment in the city or county jail for not more than one (1) year and a fine not to exceed five thousand dollars (\$5,000). [I.C., § 18-6402, as added by 1981, ch. 123, § 3, p. 211.]

Compiler's notes. Former § 18-6402 which comprised I.C., § 18-6402, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 123, § 2.

Another former § 18-6402 which comprised Cr. & P. 1864, § 122; R.S., R.C., & C.L., § 6915; C.S., § 8365; I.C.A., § 17-3002, was

repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

The bracketed word "nor" in clause (a) was inserted by the compiler.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-6403. Rout defined. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-6403, as added by 1972, ch. 336, § 1, p. 844 was repealed by S.L. 1981, ch. 123, § 4.

Another former § 18-6403 which comprised R.S., R.C., & C.L., § 6952; C.S. 8336; I.C.A., § 17-3003 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-6404. Unlawful assembly defined. — Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly. [I.C., § 18-6404, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 121; R.S., R.C., & C.L., § 6953; C.S., § 8367; I.C.A., § 17-3004 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Commanding rioters to disperse, § 19-224.

Collateral References. 91 C.J.S., Unlawful Assembly, § 1 et seq.

Attorney, participation in unlawful assembly as ground for disbarment or suspension. 9 A.L.R. 201; 43 A.L.R. 110.

Unlawful parade as riot. 9 A.L.R. 552.

Vagrancy, disorderly conduct in public place as. 14 A.L.R. 1489.

Civil liability of member of mob. 27 A.L.R. 549.

Words as disorderly conduct. 48 A.L.R. 87.

What constitutes riot within criminal law. 49 A.L.R. 1135.

Police officer, failure of one on street to obey order of, to move on, as disorderly conduct. 65 A.L.R.2d 1152.

What constitutes offense of unlawful assembly. 71 A.L.R.2d 875.

Peaceful picketing of private residence. 42 A.L.R.3d 1353.

Validity, construction, and application of state or local enactments regulating parades. 80 A.L.R.5th 255.

18-6405. Punishment for unlawful assembly. — Every person who participates in any unlawful assembly is guilty of a misdemeanor. [I.C., § 18-6405, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 167, § 3, p. 374.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 121; R.S., R.C., & C.L., § 6954; C.S., § 8368; I.C.A., § 17-3005 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Sections 2 and 4 of S.L. 1994, ch. 167 are compiled as §§ 18-5412 and 18-6409, respectively.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-6406, 18-6407. Persons present at riots and routs after warning to disperse — Officers neglecting to suppress riots. [Repealed.]

Compiler's notes. Former § 18-6406, which comprised I.C., § 18-6406, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-6406, which comprised Cr. & P. 1864, § 119; R.S., R.C., & C.L., § 6955; C.S., § 8369; I.C.A., § 17-3006 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Former § 18-6407, which comprised I.C., § 18-6407, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-6407, which comprised Cr. Prac. 1864, § 41; R.S., R.C., & C.L., § 6956; C.S., § 8370; I.C.A., § 17-3007 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and another version added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6408. Prize fights. [Repealed.]

Compiler's notes. This section which comprised I.C., § 18-6408 as added by S.L. 1972,

ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

Another § 18-6408 which comprised Cr. & P. 1864, § 39; R.S., R.C., & C.L., § 6957; C.S., § 8371; I.C.A., § 17-3008, was repealed by

S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-6409. Disturbing the peace. — Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood, family or person, by loud or unusual noise, or by tumultuous or offensive conduct, or by threatening, traducing, quarreling, challenging to fight or fighting, or fires any gun or pistol, or uses any vulgar, profane or indecent language within the presence or hearing of children, in a loud and boisterous manner, is guilty of a misdemeanor. [I.C., § 18-6409, as added by 1972, ch. 336, § 1, p. 844; am. 1972, ch. 381, § 14, p. 1102; am. 1994, ch. 167, § 4, p. 374.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 6959; C.S., § 8373; I.C.A., § 17-3009 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sections 12 and 15 of S.L. 1972, ch. 381 are compiled herein as §§ 18-4901 and 18-7032, respectively.

Sections 3 and 5 of S.L. 1994, ch. 167 are compiled as §§ 18-6405 and 18-6710, respectively.

Cross ref. Any person disturbing the peace on a railway train is guilty of a misdemeanor, § 18-6012.

Indecency and obscenity, § 18-4101 et seq.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Rule to sec. ref. This section is referred to in M.C.R., Rule 13.

Cited in: *Monske v. Klee*, 38 Idaho 314, 221 P. 152 (1923); *Stoneberg v. State*, 106 Idaho 519, 681 P.2d 994 (1984); *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986); *State v. Jeppesen*, 138 Idaho 71, 57 P.3d 782 (2002); *State v. Rae*, — Idaho —, 84 P.3d 586 (Ct. App. 2004).

ANALYSIS

Constitutionality.
In general.

Constitutionality.

Defendant's loud, profane outburst, directed at a 13-year-old friend of her daughter, constituted "fighting words" and was not constitutionally protected under either the First Amendment of the U.S. Constitution or the Idaho Constitution Article 1, § 9. *State v. Hammersley*, 134 Idaho 816, 10 P.3d 1285 (2000).

This section is not overbroad or unconstitutionally vague, and gives adequate notice of the conduct proscribed as well as adequate guidance to those charged with enforcing it. *State v. Hammersley*, 134 Idaho 816, 10 P.3d 1285 (2000).

Defendant's disturbing the peace conviction for telling a detective in the courthouse to "fuck off" was vacated as the statement was protected speech and not subject to the fighting words exception to the First Amendment. *State v. Suiter*, 138 Idaho 13, 56 P.3d 775 (2002).

While the Supreme Court of Idaho struck the third part of Idaho Code § 18-6409 as unconstitutional because it criminalized speech that was protected by the First Amendment, the court affirmed the judgment of conviction because defendant did not allege that the statute was unconstitutionally applied to his conduct or that he did not have fair notice that his conduct was proscribed. *State v. Poe*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 38 (Mar. 4, 2004).

In General.

There is nothing in the context of Idaho Code § 18-6409 that indicates a legislative intent for the word "wilfully" in that statute to have a meaning different from that provided by Idaho Code § 18-101(1). The statutory definition of "wilfully" provided by § 18-101 applies to the word "wilfully" in § 18-6409. *State v. Poe*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 38 (Mar. 4, 2004).

Collateral References. Conduct amounting to offense of disturbing public meeting. 12 A.L.R. 650.

Abusive language addressed to trespasser as breach of peace. 34 A.L.R. 575.

Abusive or insulting language addressed to group as breach of peace. 34 A.L.R. 580.

Insulting words as criminal offense. 48 A.L.R. 95.

Public regulation and prohibition of sound amplifiers or loudspeaker broadcasts in streets and other public places as infringement of right of assembly. 10 A.L.R.2d 627.

Misuse of telephone as breach of peace. 97 A.L.R.2d 505.

Larceny as within disorderly conduct statute or ordinance. 71 A.L.R.3d 1156.

Insulting words addressed directly to police

officer as breach of peace or disorderly conduct. 14 A.L.R.4th 1252.

Validity, construction, and operation of Fed-

eral disorderly conduct regulation (36 C.F.R. § 2.34). 180 A.L.R. Fed. 637.

18-6410. Assembly to disturb peace — Refusal to disperse. — If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor. [I.C., § 18-6410, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 119; R.S., R.C., & C.L., § 6960; C.S., § 8374; I.C.A., § 17-3010 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Exhibition or use of deadly weapon, § 18-3303.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Rule to sec. ref. This section is referred to in M.C.R., Rule 13.

Collateral References. Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct. 65 A.L.R.2d 1152.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 A.L.R.3d 551.

CHAPTER 65

ROBBERY

SECTION.

18-6501. Robbery defined.

18-6502. Fear which constitutes robbery.

SECTION.

18-6503. Punishment for robbery.

18-6501. Robbery defined. — Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. [I.C., § 18-6501, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 60; R.S., R.C., & C.L., § 6590; C.S., § 8226; I.C.A., § 17-1305 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Assault with intent to commit robbery, § 18-907.

Information generally, § 19-1301 et seq.

Juvenile charged with robbery, when proceeded against as adult, § 20-509.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-7803, 19-2520, 19-5307 and 19-5506.

Cited in: State v. Morris, 97 Idaho 420, 546 P.2d 375 (1976); State v. Ehrmantrout, 100 Idaho 202, 595 P.2d 1097 (1979); State v.

Smith, 103 Idaho 135, 645 P.2d 369 (1982); State v. Reinke, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982); State v. Tucker, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982); State v. Mallery, 105 Idaho 352, 670 P.2d 57 (Ct. App. 1983); Almada v. State, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985); State v. Pearson, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985); State v. Merrifield, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985); State v. Storey, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); State v. Langley, 110 Idaho 895, 719 P.2d 1155 (1986); State v. Jaramillo, 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987); State v. Marchant, 115 Idaho 403, 766 P.2d 1284 (Ct. App. 1989); State v. Shaffer, 123 Idaho 167, 845 P.2d 585 (Ct. App. 1993); Smith v. State, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996); State v. Amerson, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997); State v. Jenkins, 133

Idaho 747, 992 P.2d 196 (Ct. App. 1999); *State v. Shanahan*, 133 Idaho 896, 994 P.2d 1059 (Ct. App. 1999).

ANALYSIS

Comments by prosecutor.
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Comments by Prosecutor.

Closing argument comments by the prosecutor emphasizing the lack of credibility of defense accusations of a "frame-up" of defendant by the police and the prosecution were not so inherently prejudicial that a timely objection, accompanied by an instruction by the court to disregard the comments, would not have cured the defect. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Double Jeopardy.

Defendant's simultaneous convictions of robbery and kidnapping violated neither the double jeopardy clause of the United States Constitution nor the Idaho multiple punishment statute. *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980).

Where there was only one event, defendant's shooting at victim's door, on which charges could be based, the charge of assault with a deadly weapon was a lesser included offense in a charge of attempted robbery such as to preclude conviction of both charges under the double jeopardy clause of the fifth amendment of the United States Constitution and the Idaho Constitution. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

Where all the elements required to sustain a conviction of robbery were also within the elements needed to sustain a conviction of felony murder, robbery was a lesser included offense of felony-murder, and, therefore, the robbery conviction merged as a lesser included offense of the felony murder conviction. *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986).

Elements of Offense.

Repossession by force of money lost gambling does not constitute robbery. *State v. Price*, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458 (1923).

Secrecy or shielding identity is not an element of the felonious intent essential to rob-

bery. *State v. Huff*, 56 Idaho 652, 57 P.2d 1080 (1936).

It is unnecessary for the victim to actively resist the robber in order to provoke a more compelling display of force. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Fear and the force of fear may be created by threatening circumstances. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Because one who is in the process of stealing property and who uses force or fear in removing that property from the owner's immediate presence commits the crime of robbery, the defendant was properly convicted of that crime where he used a gun to force the victim and other store employees to back away so that he could grab a computer game from a shopping cart. *State v. Martinez*, 133 Idaho 484, 988 P.2d 710 (Ct. App. 1999).

Employee was under a general obligation to safeguard the restaurant premises and contents, and he was therefore in possession of the property as against anyone who might attempt to steal it; the money would have been within the employee's reach and observation but for defendant's act of forcing the employee into the cooler; accordingly, the money that was stolen was within the employee's immediate presence for purposes of application of the robbery statute. *State v. Behrens*, 138 Idaho 279, 61 P.3d 636 (Ct. App. 2003).

Evidence.

On prosecution for robbery, fact that money taken was in the possession of prosecuting witness was sufficient evidence of ownership to sustain conviction. *State v. Brill*, 21 Idaho 269, 121 P. 79 (1912).

In a robbery prosecution where defendants denied acting in concert but where the evidence showed that two of the defendants took the victim's wallet while the other two defendants were beating victim, all four defendants were properly convicted of robbery despite defendants' contention that state did not prove elements of robbery as to each defendant. *State v. Gerhardt*, 97 Idaho 603, 549 P.2d 262 (1976).

Although, in a prosecution for robbery, there was a chance that the jury might infer from the erroneously admitted evidence of a chase and shootout that the defendant was an outlaw and therefore predisposed to commit a robbery, this risk was vastly outweighed by other compelling evidence establishing the defendant's involvement in the robbery; thus, testimony regarding the chase did not contribute to the verdict, and its admission was harmless error. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Where, in a prosecution for robbery of a store, the central issue at trial was the identity of persons who robbed the store, testimony regarding the capture of the defendant, yielding articles connected with the robbery,

was admissible as highly probative of the defendant's identity as one of those persons and relevant. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

The fact that no threatening statements were made to a guard by defendant during his escape from a hospital at the time he demanded the guard's boots does not dissipate the fear that the guard experienced at the time his life was threatened with the metal pipe and the record is replete with testimony showing that the boots were taken from the guard against his will by threat of force; accordingly, there was sufficient evidence in the record to support the robbery conviction. *State v. Knutson*, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991).

Even though no weapon was seen during the course of the robbery, where defendant made a threat implying that a concealed weapon was present, sawed-off shotgun found in defendant's automobile was slightly relevant and was admissible as its probative value was not outweighed by its prejudicial impact. *State v. Waddle*, 125 Idaho 526, 873 P.2d 171 (Ct. App. 1994).

Trial court properly convicted defendant of bank robbery without considering alternative perpetrators; there was no evidence linking third parties to the crime. *State v. Kerchusky*, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003).

Indictment and Information.

In indictment for robbery the words "felonious" and "rob" carry with them the intent, and are sufficient. *People v. Butler*, 1 Idaho 231 (1869).

Information for robbery is sufficient if it charges the offense in words of this section. Information for robbery is sufficient, though not in the exact language of the statute, if words used convey the same idea. *State v. Brill*, 21 Idaho 269, 121 P. 79 (1912).

Information couched in the language of, and containing all of the elements recited in the statutes defining robbery is sufficient though it omit to charge intent essential to charge grand larceny. *State v. Huff*, 56 Idaho 652, 57 P.2d 1080 (1936).

A charge that an accused took money from the person, or from the immediate presence of the person, and that it was taken against his will and by means of force or fear, constituted the single charge of robbery and such a charge afforded the accused proper means by which to prepare a defense of the particular crime charged. *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

In a prosecution for robbery and kidnapping the jury was at liberty to believe the victim's version of the story or to reject it as unreliable, and by convicting the defendant of the crimes charged, the jury chose to accept the victim's version; and where the victim

furnished competent and sufficient evidence to support such a finding which was corroborated by the testimony of the witness and the arresting police officers, the record contained sufficient evidence to constitute a prima facie case and the court did not err in refusing to dismiss the case. *State v. Cotton*, 100 Idaho 573, 602 P.2d 71 (1979).

The trial court did not abuse its discretion in allowing a witness to testify that a gun had disappeared from his apartment about the time of defendant's visit, where the probative value of that evidence linking the defendant to the commission of armed robbery outweighed the prejudicial effect of the testimony in placing before the jury evidence of another unrelated crime allegedly committed by the defendant. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Where there was uncontradicted testimony of victim and another witness that defendant had taken money from the victim in her living room, such testimony was sufficient to sustain defendant's conviction for robbery. *State v. Crawford*, 104 Idaho 840, 663 P.2d 1142 (Ct. App. 1983).

Jury's failure to find defendant guilty of murder while finding him guilty of robbery on testimony arising out of the same incident was not inconsistent and did not taint the robbery conviction where testimony concerning the murder was partially contradicted but testimony concerning the robbery was not. *State v. Crawford*, 104 Idaho 840, 663 P.2d 1142 (Ct. App. 1983).

In robbery prosecution, evidence that gun found in defendant's car was stolen was proper to rebut the testimony of defendant's wife that she was the owner of the weapon and to demonstrate the implausibility of her story that she had inadvertently left the gun in the car, and the prejudicial effect of the evidence was outweighed by its value in testing her credibility. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

In an appeal from a conviction of robbery under this section, where defendant's car was spotted immediately prior to the robbery, there was sufficient evidence to stop the car after the robbery had been committed, and a search of the passenger compartment by the police was legal, and the evidence seized during such warrantless search was admissible at trial. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984).

Where the alleged robbery occurred at night in a grocery store with the use of a dark blue .22 caliber pistol, and the defendant threatened the night manager that he had been to Vietnam and was not scared of killing anyone, the trial court properly allowed evidence of another robbery committed eight days later, by the defendant, under identical circumstances, i.e. a grocery store, at night,

with a dark blue .22 caliber pistol, and threats referring to Vietnam, since such evidence was relevant to establish a common identity of the robbers in both robberies through a modus operandi and a limiting instruction was given to the jury to limit any prejudicial effect of such evidence. *State v. Stedtfeld*, 108 Idaho 695, 701 P.2d 315 (Ct. App. 1985).

The trial court properly admitted the testimony of the defendant's roommate concerning the defendant's statements indicating his involvement in an earlier aborted attempt to commit robbery, where the testimony was relevant to the question of identity, in that the defendant was similarly dressed, armed with a sawed-off shotgun, and had a female accomplice in both the aborted and committed robberies, and where the probative value of the evidence outweighed any prejudice to the defendant. *State v. Carlson*, 108 Idaho 859, 702 P.2d 897 (Ct. App. 1985).

Instructions to Jury.

Instruction to jury "that if they believe from the evidence that defendants feloniously took possession of the United States mail, or any part thereof, by force or intimidation of or from a carrier of the mail, then offense of robbery is complete," is not erroneous. *United States v. Mays*, 1 Idaho 763 (1880).

Instruction that if a man stealthily filch the pocket of another, force necessary to remove the property is all the force that the statute requires, is erroneous, as it ignores all distinction between robbery and larceny from the person. *Territory v. McKern*, 3 Idaho 15, 26 P. 123 (1891).

Instruction as follows held reversible error: "If a person losing at cards voluntarily delivers the money lost to the winner's actual possession, the winner owns the money, so that the forcible taking of it from his possession may constitute robbery." *State v. Price*, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458 (1923).

Instruction in the language of this and the following section sufficiently defines the offense and the intent to commit larceny. *State v. Huff*, 56 Idaho 652, 57 P.2d 1080 (1936).

It was not error to refuse to give an instruction containing the statutory definition of robbery and the statutory definition of fear with respect to robbery where one of the court's instructions gave the statutory definition of robbery and another told the jury they must find "that the defendants took said property by force and violence or by intimidating and putting said victims in fear of personal harm." *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

A jury instruction which stated that the defendant had been accused by information of the crime of robbery and that defendant had a preliminary examination before a magistrate did not violate the defendant's right to a

presumption of innocence on the argument that the instruction could give a jury the impression that a magistrate had already found defendant guilty of the crime charged, where another instruction cautioned the jury that the fact that defendant had been brought before the court to stand trial on a robbery charge was not evidence of his guilt. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Where jury instructions clearly set out the specific intent required for the crime of robbery and the jury was instructed that they could find that at the time the alleged crime was committed defendant was suffering from a mental condition which prevented him from forming such specific intent, the court's instructions fairly and accurately presented the issue of intent and stated the applicable law correctly. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Intent.

The intent necessary to support a conviction for robbery existed where the defendant's intimidation or battery of the victim prompted the victim to offer money and the defendant took the money with knowledge that the offer was provoked by the defendant's threats or acts of violence and with intent to permanently deprive the victim of the property, and it was immaterial whether the defendant harbored an intent to steal when the violence or intimidation occurred if, when taking the victim's possessions, the defendant knew that his violence or threats motivated the victim's surrender of the property. *State v. Belue*, 127 Idaho 464, 902 P.2d 489 (Ct. App. 1995).

Where testimony demonstrated that the defendant committed acts in furtherance of an intent to take property from a pawn shop by force when he entered the shop and gave a signal to another participant to start shooting, even though the defendant did not complete the robbery by actually taking property, his actions were sufficient to sustain a verdict for attempted robbery. *State v. Fabeny*, 132 Idaho 917, 980 P.2d 581 (Ct. App. 1999).

Judgment.

—Correction.

Where a trial court's judgment after referring both to the "armed robbery" and to persistent violator status, contained a technical error in that it sentenced the defendant to custody of the Board of Correction for two concurrent, indeterminate periods not exceeding 30 years "on each count," the judgment had to be corrected to state that the defendant, having been adjudicated a persistent violator, was given a single 30-year indeterminate sentence for the robbery. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Where the trial court's judgment labeled an "order of commitment," recited that the defendant was convicted, upon a guilty plea, of "armed robbery," when in reality, the defendant was found guilty of robbery after a jury trial, the judgment had to be corrected to state simply that the defendant was convicted, upon a jury verdict, of robbery. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Larceny Distinguished.

Where the victim was confronted by a masked man with a hand in one of his coat pockets, the jury could have reasonably concluded that the masked individual intended to rob the store, that he was armed and prepared to do so, that the victim feared for her own safety and that such fear was sufficient to meet the requirements for robbery; accordingly, defendant who was identified as the masked assailant was properly convicted of robbery rather than larceny. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Preliminary Hearing Testimony.

The admission of the preliminary hearing testimony of a person identified as the robber by the robbery victim during her testimony at the preliminary hearing did not violate defendant's right to confrontation, even though the person could not be located at the time of defendant's robbery trial, where there was never any serious contention that the person identified as the assailant had committed the crime, and where the sole purpose of reference to the preliminary hearing testimony was to impeach the testimony of the robbery victim. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Presentence Report.

Where a presentence report in a prosecution for robbery and assault with a deadly weapon did not make clear the number of felonies with which the defendant had previously been charged but did establish three previous felony convictions, the error, if any, was not prejudicial. *State v. Jagers*, 98 Idaho 779, 572 P.2d 882 (1977).

Prosecutorial Misconduct.

In an appeal from a conviction of robbery under this section, where the prosecutor personally attacked the defense counsel in his closing arguments, such prosecutorial misconduct, although improper, was not reversible error since, given the overwhelming and conclusive proof of the defendant's guilt, such misconduct did not materially contribute to the verdict of the jury. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984).

Sentence.

In an appeal from a conviction of robbery under this section, where the defendant's

prior record included numerous felonies for robbery and burglary, delineating a clear pattern of criminal behavior since at least 1954, the district court did not abuse its discretion by imposing a 30-year fixed sentence. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984).

Imposition of a ten-year unified sentence with a four-year minimum period of confinement for attempted robbery was not an abuse of discretion in light of the defendant's previous record, his past unsuccessful attempts at rehabilitation and his admitted use and sale of drugs. *State v. Sommerfeld*, 116 Idaho 518, 777 P.2d 740 (Ct. App. 1989).

Where the district court considered the defendant's 13 prior felonies, and took into account the nature of the offense — a robbery which placed many people at physical risk — and the fact that the defendant was in need of drug treatment which could be provided as deemed appropriate by the Department of Correction, there was no abuse of discretion by the trial court by sentencing defendant to a unified sentence of thirty years in prison with a minimum of fifteen years. *State v. Brandt*, 119 Idaho 60, 803 P.2d 561 (Ct. App. 1990).

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

A sentence of 30 years with a minimum period of confinement of ten years for the robbery of a guard's boots during defendant's escape from a hospital, was not excessive. *State v. Knutson*, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991).

Sentence of 10 to 30 years for robbery was reasonable where defendant robbed a store with a shotgun and shot a store clerk who was permanently disfigured and could have been killed. *State v. Gonzales*, 123 Idaho 92, 844 P.2d 721 (Ct. App. 1993).

A fifteen-year determinate sentence for attempted murder and a consecutive 35-year sentence, with fifteen years determinate, for robbery was not excessive, where the character of the offense was vicious and unprovoked, involving infliction of multiple stab wounds on a helpless victim. *State v. Mitchell*, 124 Idaho 374, 859 P.2d 972 (Ct. App. 1993).

Trial court properly denied defendant's motion for a reduction in sentence under I.C.R. 35; given defendant's past history and the fact that a past rehabilitation attempt failed, the trial court properly found that probation was not appropriate, and defendant's sentence of a unified term of 30 years in prison with 10 years determinate for defendant's convictions of robbery and eluding a police officer in violation of §§ 18-6501, 49-1404 was not ex-

cessive in violation of Idaho Const. Art. I, § 6 and no reduction was required. *State v. Hayes*, 138 Idaho 761, 69 P.3d 181 (Ct. App. 2003).

Sentence of fifteen years with six years determinate imposed on defendant convicted of robbery was not excessive. The sentence was supported by defendant's criminal record that included prior felony convictions for grand theft and theft by extortion as well as eleven misdemeanor convictions. *State v. Kerchusky*, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003).

Venue.

In prosecution for robbery, district court did not abuse its discretion in denying motion for change of venue because of pretrial publicity where at the voir dire, three of the potential jurors admitted that they had no knowledge of defendant or of the crime he was alleged to have committed, where of the remaining 52 potential jurors, counsel moved to strike only two individuals for cause when they stated that they had already formed an opinion in the case based on news reports of the crime, where one of defense counsel's challenges for cause was overruled by the district court, but that individual was not ultimately seated on the jury, and both the prosecution and the defense exercised all available peremptory challenges and expressed no dissatisfaction with the 12 jurors selected. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

Collateral References. 67 Am. Jur. 2d, Robbery, § 1 et seq.

77 C.J.S., Robbery, § 1 et seq.

Taking property from the person by stealth as robbery. 8 A.L.R. 359.

Insufficient lighting as proximate cause of robbery. 11 A.L.R. 1414.

Directing acquittal for insufficiency of the evidence, duty of court as to. 17 A.L.R. 925.

"Infamous offense," robbery as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1016.

Threat to arrest or prosecute and acts in connection therewith as force or putting in

fear for purposes of robbery. 27 A.L.R. 1299.

Reduction by appellate court of punishment imposed by trial court. 29 A.L.R. 341; 89 A.L.R. 295.

What constitutes attempt to commit robbery. 55 A.L.R. 714.

Entrapment to commit robbery. 66 A.L.R. 506; 86 A.L.R. 263.

Robbing of contraband. 75 A.L.R. 1479.

Outlawed liquor as subject of robbery. 75 A.L.R. 1480.

May participant in larceny or theft be convicted of offenses of receiving or concealing the stolen property. 136 A.L.R. 1087.

Criminal liability of soldiers, sailors and militiamen. 158 A.L.R. 1462.

Admissibility, in robbery prosecution, of evidence of other robberies. 42 A.L.R.2d 854.

Gambling or lottery paraphernalia as subject of robbery. 51 A.L.R.2d 1396.

Fact that gun was unloaded as affecting criminal responsibility for robbery. 79 A.L.R.2d 1426.

Stolen money or property as subject of robbery. 89 A.L.R.2d 1435.

Purse snatching as robbery or theft. 42 A.L.R.3d 1381.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time. 51 A.L.R.3d 693.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 A.L.R.3d 727.

Gambling, retaking of money lost at, as robbery. 77 A.L.R.3d 1363.

Robbery by means of toy or simulated gun or pistol. 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim. 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than taking property, as element of robbery. 93 A.L.R.3d 643.

"Intimidation" as element of bank robbery under 18 U.S.C.A. § 2113(a). 163 A.L.R. Fed. 225.

18-6502. Fear which constitutes robbery. — The fear which constitutes robbery may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,

2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery. [I.C., § 18-6502, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C. L., § 6591; C.S.,

§ 8227; I.C.A., § 17-1306 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

ANALYSIS

Instructions to jury.

Resistance unnecessary.

Sufficiency of evidence.

Threatening circumstances.

Instructions to Jury.

It was not error to refuse to give an instruction containing the statutory definition of robbery and the statutory definition of fear with respect to robbery where one of the court's instructions gave the statutory definition of robbery and another told the jury they must find "that the defendants took said property by force and violence or by intimidating and putting said victims in fear of personal harm." *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

Resistance Unnecessary.

It is unnecessary for the victim to actively resist the robber in order to provoke a more compelling display of force. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Sufficiency of Evidence.

Where the victim was confronted by a masked man with a hand in one of his coat

pockets, the jury could have reasonably concluded that the masked individual intended to rob the store, that he was armed and prepared to do so, that the victim feared for her own safety and that such fear was sufficient to meet the requirements for robbery; accordingly, defendant who was identified as the masked assailant was properly convicted of robbery rather than larceny. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

The fact that no threatening statements were made to a guard by defendant during his escape from a hospital at the time he demanded the guard's boots does not dissipate the fear that the guard experienced at the time his life was threatened with the metal pipe and the record is replete with testimony showing that the boots were taken from the guard against his will by threat of force; accordingly, there was sufficient evidence in the record to support the robbery conviction. *State v. Knutson*, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991).

Threatening Circumstances.

Fear and the force of fear may be created by threatening circumstances. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Collateral References. Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

18-6503. Punishment for robbery. — Robbery is punishable by imprisonment in the state prison not less than five (5) years, and the imprisonment may be extended to life. [I.C., § 18-6503, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 60; R.S., R.C., & C.L., § 6592; C.S., § 8228; I.C.A., § 17-1307 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Gowin*, 97 Idaho 146, 540 P.2d 808 (1975); *State v. Thompson*, 101 Idaho 440, 614 P.2d 970 (1980); *Reeves v. State*, 105 Idaho 844, 673 P.2d 444 (Ct. App. 1983); *State v. Ramsey*, 105 Idaho 898, 673 P.2d 1092 (Ct. App. 1983); *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984); *State v. Spurgeon*, 107 Idaho 173, 687 P.2d 17 (Ct. App. 1984); *Volker v. State*, 107 Idaho 1059, 695 P.2d 809 (Ct. App. 1985); *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985); *State v. Araiza*, 109 Idaho 188, 706 P.2d 77 (Ct. App. 1985); *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Jaramillo*, 113 Idaho 862, 749 P.2d 1 (Ct. App.

1987); *State v. Hoffman*, 114 Idaho 139, 754 P.2d 452 (Ct. App. 1988); *State v. Brennan*, 117 Idaho 123, 785 P.2d 687 (Ct. App. 1990); *State v. Gillette*, 121 Idaho 629, 826 P.2d 1341 (Ct. App. 1992); *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999); *State v. Jenkins*, 133 Idaho 747, 992 P.2d 196 (Ct. App. 1999); *State v. Shanahan*, 133 Idaho 896, 994 P.2d 1059 (Ct. App. 1999).

ANALYSIS

Appellate remedies.

Discretion of court.

Enhanced sentence for use of deadly weapon.

Excessive sentence.

Indeterminate life sentences.

Minimum sentence.

Recommendation by state.

Reduction of sentence.

— Properly refused.

Sentence upheld.

Uniformity of sentences.

Appellate Remedies.

Having failed to appeal to this court his conviction and life sentence for robbery and five-year term for escape from jail, though given an adequate opportunity to do so, petitioner could not subsequently employ habeas corpus as an appellate remedy. *Mahaffey v. State*, 87 Idaho 233, 392 P.2d 423 (1964).

Discretion of Court.

Where defendant had criminal record identical to that of codefendant but evidence showed defendant had also tried to suborn perjury and bounced checks while awaiting trial, trial court did not abuse discretion in giving defendant a reduced sentence of 18 years on armed robbery conviction while sentencing codefendant to only 10 years. *State v. Kohoutek*, 101 Idaho 698, 619 P.2d 1151 (1980).

In view of defendant's status as a persistent violator, which allows for enhancement of sentences imposed for other crimes, and his conviction for robbery, which is itself punishable by incarceration for life, and where presentence reports demonstrated defendant's anti-social and unstable behavior, trial court did not abuse discretion in imposing indeterminate life sentence. Nor would such sentence be reduced on appeal despite defendant's claim of "diminished responsibility" demonstrated by a history of self-mutilation. *State v. Lloyd*, 104 Idaho 397, 659 P.2d 151 (Ct. App. 1983).

Where defendant had a previous conviction for armed robbery and used a firearm in the commission of second armed robbery and where the district court explained its reasons for the total sentence, noting that it reflected the severity of the crime while still allowing appellant the opportunity to straighten out his life, court did not err in sentencing defendant to indeterminate terms of ten years for robbery and three years for use of firearm. *State v. Mallery*, 105 Idaho 352, 670 P.2d 57 (Ct. App. 1983).

Confinement for at least six years and eight months would not exceed the period necessary to protect society from defendant's pattern of conduct nor to punish the crime of robbery, and sentencing discretion was not abused where trial court imposed indeterminate term not exceeding 20 years. *State v. Adams*, 106 Idaho 309, 678 P.2d 101 (Ct. App. 1984).

Where the presentence report in a robbery prosecution showed that the defendant had compiled an exceptionally long prior record, the district court did not abuse its discretion in sentencing the defendant to an indeterminate, 30-year period of custody on the robbery charge and as a persistent violator. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Enhanced Sentence for Use of Deadly Weapon.

Section 19-2520 does not violate the constitutional guarantee against double jeopardy by providing for multiple penalties for the same offense, but rather it provides for a single more severe penalty when an offense is committed with a deadly weapon; accordingly, where the trial court sentenced the defendant to two five-year concurrent terms for two robberies and then imposed an additional three-year term, to be served consecutively, for the defendant's use of a firearm during the crimes, the penalty actually imposed upon the defendant did not violate the double jeopardy prohibition and was well within the limits intended by the legislature in § 19-2520. *State v. Galaviz*, 104 Idaho 328, 658 P.2d 999 (Ct. App. 1983).

Where the defendant was sentenced to an indeterminate sentence of 20 years for robbery under this section, enhanced by ten consecutive years for use of a firearm under § 19-2520, such sentencing was within the statutory limits and did not constitute an abuse of discretion where the defendant's prior record consisted of misdemeanors, the defendant subsequently pled guilty to a charge of robbery, psychological evaluations had shown an inability to perceive socially appropriate behavior or the consequences of his actions and one evaluation had diagnosed him as psychopathic, and the defendant showed no remorse for the robbery. *State v. Stedtfeld*, 108 Idaho 695, 701 P.2d 315 (Ct. App. 1985).

Defendant's sentences for attempted robbery and aggravated battery were not excessive or represent an abuse of discretion where trial judge imposed maximum concurrent sentences, 15 years, for each crime and because defendant used a firearm in committing aggravated battery, the court extended the aggravated battery sentence for an additional 15 years, as permitted by § 19-2520; for each crime the sentencing judge specified that the minimum term of confinement would be the entire length of the sentence and under these sentences defendant must spend 30 years in confinement without the possibility of parole. *State v. Sanchez*, 115 Idaho 394, 766 P.2d 1275 (Ct. App. 1988).

Excessive Sentence.

The imposition of a ten year sentence on a robbery conviction was not an abuse of trial court's discretion when the defendant had the opportunity to be heard at a mitigation hearing prior to sentence but failed to avail himself of the opportunity and when the defendant perpetrated the crime by means of a deadly weapon. *State v. Izatt*, 93 Idaho 864, 477 P.2d 106 (1970).

District court abused its discretion by arriv-

ing at an unreasonably harsh sentencing structure of incarceration for sixty years without the possibility of parole for defendant's crimes of rape, forcible sexual penetration with a foreign object and robbery; totality of sentences was more than reasonably necessary to accomplish sentencing goals. Consecutive 25-year determinate terms modified to be served concurrently and consecutive 10-year determinate term for robbery modified to be made indeterminate. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Where a sentence is imposed within the statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court which imposed the sentence; this showing is dependent upon the circumstances of each particular case. *State v. Seifart*, 100 Idaho 321, 597 P.2d 44 (1979).

It does not follow that disparity of sentences between multiple defendants involved in the same criminal activity, or between different defendants for committing similar crimes, constitutes excessiveness of sentence as to any particular defendant. *State v. Seifart*, 100 Idaho 321, 597 P.2d 44 (1979).

Where, in an armed robbery prosecution, the defendant steadfastly concealed his true identity, his family background, and personal circumstances so that the trial court had scant information upon which to base an evaluation of the defendant's past history or propensity to commit more crimes, the trial court did not abuse its discretion in sentencing him for an indeterminate term not exceeding 20 years because the sentence imposed was within the statutory limits and was not shown to be clearly excessive when applied to the particular facts of the case. *State v. Bylama*, 103 Idaho 472, 649 P.2d 1228 (Ct. App. 1982).

Where defendant received five-year sentence for robbery enhanced by three-year sentence for use of firearm, which sentences were within the statutory maximums, and where such sentences were suspended and defendant placed on probation, but defendant subsequently violated probation, the reimposition of the balance of the sentence, including the enhanced portion, was not excessive. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Indeterminate Life Sentences.

Where defendant was diagnosed as having a schizophrenic illness presently in remission and a personality disorder with predominantly antisocial features, and he had an extensive record of prior convictions, including one prior robbery, two indeterminate life sentences for two robberies did not represent an abuse of discretion. *State v. Potter*, 109 Idaho 967, 712 P.2d 668 (Ct. App. 1985).

Minimum Sentence.

Although this section indicates that the minimum sentence for robbery is five years, the minimum period of confinement under the sentence, pursuant to the Unified Sentencing Act, may be for a term less than five years. *State v. Haggard*, 116 Idaho 276, 775 P.2d 168 (Ct. App. 1989).

Recommendation by State.

A trial court is not bound by a sentence recommendation made by the state even though that recommendation was offered in conjunction with a negotiated plea; the state's recommendation to the trial court is purely advisory. Accordingly, the trial court did not err in sentencing the defendant to an indeterminate 30-year term for robbery even though the state had only recommended that a 15-year indeterminate sentence be imposed. *State v. Rossi*, 105 Idaho 681, 672 P.2d 249 (Ct. App. 1983).

Reduction of Sentence.

Where the evidence in an armed robbery prosecution showed that it was the defendant's first felony with no prior history of any criminal activity, and where the presentence report disclosed that, except for this particular incident, the defendant's character was good and that since the incident and incarceration pending hearing, he had markedly changed his dependency on prescription drugs with a resulting great improvement in his mental attitude and stability, the defendant's character and the circumstances surrounding the case sufficiently outweighed the gravity of the crime so as to require the court in the furtherance of justice to reduce the sentence of imprisonment from an indeterminate term not to exceed 20 years to an indeterminate term not to exceed 12 years. *State v. Shideler*, 103 Idaho 593, 651 P.2d 527 (1982).

— Properly Refused.

Where defendant received two concurrent, indeterminate seven-year sentences for robbery, the court acted within its sound discretion by declining to reduce such sentences further, even though defendant had no prior felony record and there were mitigating circumstances. *State v. Dusenbery*, 109 Idaho 730, 710 P.2d 640 (Ct. App. 1985).

Sentence Upheld.

Considering that defendant's attack upon victim was an unprovoked, execution-style attempt to take a human life that only fortuitously was unsuccessful and that defendant denied that he had any mental disease or needed treatment, fixed life sentence for robbery and fixed 15-year sentence for battery, enhanced by an additional 15 years for use of

a firearm, was justified to protect society. *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985).

Where the defendant broke into a private home and robbed two occupants at gunpoint, the defendant had been incarcerated in various institutions beginning when he was 19-years-old and had a prior record of at least eight felonies, he was an escapee from a penal facility at the time of the robbery, and he had failed to respond to prior efforts at rehabilitation, an indeterminate life sentence was not an abuse of discretion. *McNeeley v. State*, 111 Idaho 200, 722 P.2d 1067 (Ct. App. 1986).

The court did not abuse its discretion in electing to sentence the defendant to the custody of the Board of Corrections instead of placing him on probation where the defendant was a danger to society because of his substance abuse and his inability to control his actions as a result of that abuse. *State v. Rutter*, 112 Idaho 1142, 739 P.2d 441 (Ct. App. 1987).

Where in addition to the serious and violent nature of the robbery, the record disclosed that defendant had five prior felony convictions and had served several terms of imprisonment, the district judge did not abuse his discretion in imposing a ten-year indeterminate sentence for robbery, enhanced by a 15-year indeterminate period for use of a firearm during the robbery. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Where robbery defendant was sentenced to four to ten years in prison for taking money from restaurant employees by threatening them with knives, where the record indicated that although defendant was only 19 years old when he committed the robbery, he had an extensive criminal record consisting of other felony and misdemeanor offenses, and where defendant also pleaded guilty to assaulting a law enforcement officer while in jail awaiting disposition of the present case, the sentence imposed was not excessive and the sentencing court did not abuse its discretion by imposing same, even though extensive testimony at the sentencing hearing concerned defendant's background, growing up in an abusive household, his present difficulty in obtaining employment and his psychological difficulties. *State v. Kysar*, 116 Idaho 992, 783 P.2d 859 (1989).

A reduced sentence of a fixed term of five years plus an indeterminate term of ten years was not excessive for a conviction of robbing an elderly man at gunpoint in his home where the defendant had pressed the gun against the victim's head and where the defendant failed to complete the retained jurisdiction program. *State v. Boswell*, 118 Idaho 725, 800 P.2d 121 (Ct. App. 1990).

Where the district court considered the defendant's 13 prior felonies, and took into account the nature of the offense, a robbery

which placed many people at physical risk, and the fact that the defendant was in need of drug treatment which could be provided as deemed appropriate by the Department of Correction, there was no abuse of discretion by the trial court by sentencing defendant to a unified sentence of thirty years in prison with a minimum of fifteen years. *State v. Brandt*, 119 Idaho 60, 803 P.2d 561 (Ct. App. 1990).

An indeterminate life sentence with a 20-year minimum term of confinement for robbery conviction was not an abuse of discretion where defendant had an extensive criminal record as both a juvenile and adult, showed little remorse for his victims and blamed his actions on a substance abuse problem over which he demonstrated no willingness or motivation to gain control. *State v. Admyers*, 122 Idaho 107, 831 P.2d 949 (Ct. App. 1992).

Concurrent unified sentences of life in prison with a minimum period of confinement of 20 years for rape and robbery was not an abuse of court's discretion where defendant had a long history of encounters with the law, including four felony convictions, and was on parole when he committed the latest offenses. *State v. Zacharias*, 122 Idaho 227, 832 P.2d 1168 (Ct. App. 1992).

The district court did not abuse its discretion by denying a motion to modify defendant's sentence of an indeterminate term of life with a minimum period of confinement of ten years for robbing a bank, where the defendant had an extensive prior criminal record and indicated she had committed the crime so that she could reenter the penitentiary where she felt more comfortable than she did living outside a penal facility. *State v. Yates*, 122 Idaho 625, 836 P.2d 571 (Ct. App. 1992).

There was no abuse of discretion on the part of the district judge in imposing a 30-year sentence on plaintiff, which required a minimum of 15 years' incarceration. *State v. Galaviz*, 123 Idaho 47, 844 P.2d 29 (Ct. App. 1992).

Sentence of 10 to 30 years for robbery was reasonable where defendant robbed a store with a shotgun and shot a store clerk who was permanently disfigured and could have been killed. *State v. Gonzales*, 123 Idaho 92, 844 P.2d 721 (Ct. App. 1993).

Three concurrent sentences of 15 years to life for robbery was reasonable, where the violent robberies constituted defendant's sixth, seventh, and eighth felony convictions as an adult. *State v. Dunn*, 123 Idaho 245, 846 P.2d 247 (Ct. App. 1993).

Sentence of two to ten years on one count of robbery was reasonable where although defendant spent 28 years as a successful educator in Idaho, defendant had robbed a bank after planning the robbery for approximately a month. *State v. Shaffer*, 123 Idaho 167, 845 P.2d 585 (Ct. App. 1993).

Having examined the probable duration of

confinement in light of the nature of the crime, character of the offender, and objectives of sentencing, unified 10 year sentence imposed for crime of robbery was within guidelines, and as defendant's prior history involved felony contact with the law and the potential seriousness of involvement in armed robbery, it was proper for the district court to deny relief under I.C.R. 35 and the sentence imposed was reasonable and did not constitute an abuse of discretion. *State v. Roberts*, 126 Idaho 920, 894 P.2d 153 (Ct. App. 1995).

There was no abuse of discretion where the defendant's criminal history and the violent nature of the crime led the trial court to conclude that the defendant was an extremely dangerous person and that the sentence imposed served the sentencing goals of protec-

tion of society and retribution. *State v. Martinez*, 133 Idaho 484, 988 P.2d 710 (Ct. App. 1999).

Uniformity of Sentences.

There is no requirement under the due process clause or any other clause of the constitution which imposes a mandate upon the court to render uniform sentences against criminal defendants; otherwise the imposition of sentences would be an inflexible mechanical operation without any humanitarian or social consideration rather than an effort to make the punishment fit not only the crime but also the character and needs of the individual and the requirements of the community. *State v. Seifart*, 100 Idaho 321, 597 P.2d 44 (1979).

CHAPTER 66

SEX CRIMES

SECTION.

- 18-6601. Adultery.
- 18-6602. Incest.
- 18-6603. Fornication.
- 18-6604. [Repealed.]
- 18-6605. Crime against nature — Punishment.

SECTION.

- 18-6606. Crime against nature — Penetration.
- 18-6607. [Amended and Redesignated.]
- 18-6608. Forcible sexual penetration by use of foreign object.
- 18-6609. Crime of video voyeurism.

18-6601. Adultery. — A married man who has sexual intercourse with a woman not his wife, an unmarried man who has sexual intercourse with a married woman, a married woman who has sexual intercourse with a man not her husband, and an unmarried woman who has sexual intercourse with a married man, shall be guilty of adultery, and shall be punished by a fine of not less than \$100, or by imprisonment in the county jail for not less than three months, or by imprisonment in the state penitentiary for a period not exceeding three years, or in the county jail for a period not exceeding one year, or by fine not exceeding \$1000. [I.C., § 18-6601, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1905, p. 294, § 1; reen. R.C., & C.L., § 6807; C.S., § 8284; I.C.A., § 17-1806 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

ANALYSIS

- Corroboration.
- Criminal conversation.
- Evidence.
- Indictment.

Corroboration.

The requirement of corroboration in sex crime cases is no longer the law in Idaho. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Criminal Conversation.

Section 32-901 and this section were not grounds for wife's cause of action against husband for criminal conversation based on husband's adultery; the ill effects of a suit for criminal conversation outweigh any benefit it may have. *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994).

Evidence.

Mere disposition and opportunity to commit adultery are not alone sufficient to justify

conviction, but there must be circumstances inconsistent with any other reasonable hypothesis. *State v. Sims*, 35 Idaho 505, 206 P. 1045 (1922).

Indictment.

Sufficiency of indictment. See *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Collateral References. 2 Am. Jur. 2d, Adultery and Fornication, § 1 et seq.

2 C.J.S., Adultery, § 1 et seq.

Mistaken belief in existence, validity, or

effect of divorce or separation as defense to prosecution for adultery. 56 A.L.R.2d 915.

Cohabitation under marriage contracted after divorce decree is adultery, or decree is later reversed or set aside. 63 A.L.R.2d 816.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 A.L.R.2d 841; 2 A.L.R.4th 330.

Validity of statute making adultery and fornication criminal offense. 41 A.L.R.3d 1338.

18-6602. Incest. — Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not exceeding twenty-five (25) years. [I.C., § 18-6602, as added by 1972, ch. 336, § 1, p. 844; am. 2003, ch. 202, § 1, p. 543.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 129; R.S., R.C., & C.L., § 6809; C.S., § 8286; I.C.A., § 17-1807 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Medical examination of victim, cost paid by law enforcement agency, § 19-5303.

Sec. to sec. ref. This section is referred to in §§ 16-2002, 18-8304, 18-8314, 19-5506 and 39-1113.

Cited in: *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993); *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

ANALYSIS

Consanguinity.

Consent of woman.

Corroboration.

Evidence.

Incest not included within rape.

Indictment.

Prosecutorial discretion.

Consanguinity.

"Degrees of consanguinity," mentioned herein, are defined by § 32-205. *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Consent of Woman.

Crime of incest is committed where other elements exist, although the female is by want of age incapable of consenting thereto. *People v. Barnes*, 2 Idaho (Hasb.) 161, 9 P. 532 (1886).

Corroboration.

The requirement of corroboration in sex crime cases is no longer the law in Idaho.

State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981).

Evidence.

Prosecutrix if over age is an accomplice, and conviction cannot be had on her uncorroborated testimony. *State v. Clark*, 27 Idaho 48, 146 P. 1107 (1915).

Where evidence of prosecutrix is contradictory or her truthfulness is impeached and defendant denies her testimony and his testimony is corroborated, the testimony of prosecutrix, alone and without corroboration, will not warrant conviction. *State v. Clark*, 27 Idaho 48, 146 P. 1107 (1915); *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Incest Not Included Within Rape.

It is clear that incest, as defined by this section, includes the element of a familial relationship between the defendant and the victim, which element is not present in or necessary to the commission of rape under any subdivision of § 18-6101; because the crime of incest contains an element which is not necessary to the crime of rape, incest is not a lesser included offense of rape under the traditional statutory approach to lesser included offenses. *State v. Madrid*, 108 Idaho 736, 702 P.2d 308 (Ct. App. 1985).

Where the defendant was charged with the rape of an 18-year-old woman, under § 18-6101, but the information made no reference to the fact that the victim was the defendant's daughter, the defendant could not be convicted of incest under this section because incest is not a lesser included offense of rape, and because it would violate due process to convict a defendant for a crime not charged; however, upon the setting aside of the conviction of incest, there was no constitutional barrier to a subsequent prosecution for that

offense, since the defendant had never been charged with and prosecuted for the crime of incest. *State v. Madrid*, 108 Idaho 736, 702 P.2d 308 (Ct. App. 1985).

Indictment.

Sufficiency of indictment. See *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Prosecutorial Discretion.

Charging defendant with lewd conduct with a minor under sixteen years of age instead of incest did not constitute an abuse of prosecutorial discretion where the facts legitimately invoked both offenses. *LaBarge v. State*, 116 Idaho 936, 782 P.2d 59 (Ct. App. 1989) (decided under former law).

Collateral References. 41 Am. Jur. 2d, Incest, § 1 et seq.

42 C.J.S., Incest, § 1 et seq.

Aiding and abetting offense by one not

related to parties. 5 A.L.R. 784; 74 A.L.R. 1110; 131 A.L.R. 1322.

Reduction of punishment by appellate court. 29 A.L.R. 324; 89 A.L.R. 295.

Corroboration of confession of incest. 40 A.L.R. 469.

Dying declarations in prosecutions for incest. 49 A.L.R. 1284; 91 A.L.R. 560.

Adoption, relationship created by, as within statute regarding incest. 151 A.L.R. 1146.

Consent as element of incest. 36 A.L.R.2d 1299.

Prosecutrix in incest case as accomplice or victim. 74 A.L.R.2d 705.

Crimes against spouse within exception permitting testimony by one spouse against another in criminal prosecution - modern state cases. 74 A.L.R.4th 223.

Sexual intercourse between persons related by halfblood as incest. 34 A.L.R.5th 723.

18-6603. Fornication. — Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication, and, upon conviction thereof, shall be punished by a fine of not more than \$300 or by imprisonment for not more than six months or by both such fine and imprisonment; provided, that the sentence imposed or any part thereof may be suspended with or without probation in the discretion of the court. [I.C., § 18-6603, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1921, ch. 209, § 1, p. 420; I.C.A., § 17-1808 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

ANALYSIS

Corroboration.

Included offense.

Corroboration.

The requirement of corroboration in sex crime cases is no longer the law in Idaho. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Included Offense.

In a prosecution for lewd conduct with a minor child under sixteen, it was not error for trial court to refuse to instruct the jury on crime of fornication, for a child under sixteen could not as a matter of law give her consent and, therefore, fornication could not be a necessarily included offense of lewd conduct with a minor. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), modified on other grounds, *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Collateral References. 37 C.J.S., Fornication, § 1 et seq.

Validity of statute making adultery and fornication criminal offense. 41 A.L.R.3d 1338.

18-6604. Lewd cohabitation. [Repealed.]

Compiler's notes. Former § 18-6604, which comprised I.C., § 18-6604, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-6604, which com-

prised Act Feb. 10, 1887; R.S., R.C., & C.L., § 6812; C.S., § 8289; I.C.A., § 17-1809 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-6605. Crime against nature — Punishment. — Every person who is guilty of the infamous crime against nature, committed with mankind or

with any animal, is punishable by imprisonment in the state prison not less than five years. [I.C., § 18-6605, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 45; R.S., R.C., & C.L., § 6810; C.S., § 8287; I.C.A., § 17-1812 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Assault with intent to commit crime against nature, § 18-907.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-8304, 18-8314, 19-2520C, 19-5506, 20-525A and 72-1025.

Cited in: State v. Cotton, 100 Idaho 573, 602 P.2d 71 (1979); State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830 (1984); State v. Hernandez, 107 Idaho 947, 694 P.2d 1295 (1983); State v. Martinez, 111 Idaho 281, 723 P.2d 825 (1986); Balla v. Idaho State Bd. of Cors., 869 F.2d 461 (9th Cir. 1988); State v. Soura, 118 Idaho 232, 796 P.2d 109 (1990).

ANALYSIS

Application.

Argument of prosecuting attorney.

Constitutionality.

Construction.

Corroboration.

Crime against nature.

—Acts included.

Discretion of court.

Equal protection.

Evidence.

Information.

Instructions.

Sentence.

Standing.

Statements.

—Defendant.

—Prosecutor.

Application.

Where the evidence clearly showed that the defendant used force and threats in his attempt to coerce the pregnant victim to fellate him, the defendant had no standing to assert that this section could not constitutionally be applied to consenting adults of the opposite sex since it is a fundamental rule of constitutional law that when a statute can be applied to a person's conduct without violating any constitutional provision, he will not be heard to assert that the statute might be unconstitutional if applied to other types of behavior. State v. Goodrick, 102 Idaho 811, 641 P.2d 998 (1982).

Argument of Prosecuting Attorney.

The arguments of the prosecuting attorney, described as inflammatory in effect by the defense, urging the jurors to enforce the law

and to halt an outbreak of homosexual practices in the city was not improper and did not constitute a ground for a new trial or a reversal. State v. Larsen, 81 Idaho 90, 337 P.2d 1, cert denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

Constitutionality.

This section, which prohibits "infamous crimes against nature," may not be constitutionally enforced to prohibit private consensual marital conduct, although this holding does not affect in any way the validity of this section with respect to forced sexual activity, sexual acts with minors, nonprivate or commercial conduct or bestiality. State v. Holden, 126 Idaho 755, 890 P.2d 341 (Ct. App. 1995).

Construction.

Not only the common-law crime of sodomy is included but all unnatural carnal copulations, whether with man or beast, committed per os or per anum. State v. Altwatter, 29 Idaho 107, 157 P. 256 (1916).

The principle recognized in Idaho for more than 40 years was that this section was sufficiently broad to include not only the crime of sodomy, but also all unnatural carnal copulations whether with man or beast. State v. Larsen, 81 Idaho 90, 337 P.2d 1, cert denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

This section is not void because of vagueness or ambiguity and the acts of defendants in attacking a prison inmate and forcing him to perform the act of fellatio upon several inmates fall squarely within this section as uniformly construed for 58 years. State v. Carringer, 95 Idaho 929, 523 P.2d 532 (1974).

Even if the indeterminate sentence provision of I.C., § 19-2513 abolished the minimum sentence, I.C., § 18-112, which provides a five-year sentence for all felonies where no specific punishment is prescribed, would not be applicable to a crime against nature as this section in providing for a sentence of not less than five years left the maximum sentence to the discretion of the court. State v. Carringer, 95 Idaho 929, 523 P.2d 532 (1974).

The act of fellatio is included within the statutory definition of crimes against nature. State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975).

While this section seeks to regulate the morality of an adult populace, former § 18-6607 (now § 18-1508) seeks to provide specific protection for minors. Some, but not all, crimes of sodomy can be charged under former § 18-6607 (now § 18-5808) and similarly, many acts which violate former § 18-6607 (now § 18-5808) do not constitute sod-

omy; thus, this section and former § 18-6607 (now § 18-1508) do not conflict and represent distinct legislative choices in determining the reach of the criminal law. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984).

The infamous crime against nature includes anal intercourse, or in the language of the common law, sodomy. *State v. Hayes*, 121 Idaho 232, 824 P.2d 163 (Ct. App. 1992).

Corroboration.

The requirement of corroboration in sex crime cases is no longer the law in Idaho. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Crime Against Nature.

—Acts Included.

The term "infamous crime against nature" includes the act of fellatio. *State v. Brashier*, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

Discretion of Court.

The trial court did not abuse its discretion in denying defendant probation and in imposing a thirty-year sentence for rape conviction and two five-year terms for each conviction of infamous crimes against nature with all terms to be served concurrently. *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976).

Equal Protection.

That defendant's conduct could have been charged under either this section or former § 18-6607 (now § 18-1508) did not render his conviction for one a denial of equal protection. *Schwartzmiller v. Gardner*, 567 F. Supp. 1371 (D. Idaho 1983), modified on other grounds, 752 F.2d 1341 (9th Cir. 1984).

Evidence.

Corroboration of the testimony of an accomplice is necessary in a case involving the commission of the infamous crime against nature to support conviction. *State v. Larsen*, 81 Idaho 90, 337 P.2d 1, cert. denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

In prosecution for rape, complaining witness' testimony that she had been forced to engage in fellatio was admissible, even though it implicated defendant in another criminal act, where such act was inseparable from the entire transaction of which the rape was a part. *State v. Izatt*, 96 Idaho 667, 534 P.2d 1107 (1975).

Victim's testimony that defendant had put his penis "in" her lips and "past" her lips constituted substantial evidence of penetration. *State v. Brashier*, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

Information.

Sufficiency of information. See *State v. Altwatter*, 29 Idaho 107, 157 P. 256 (1916).

Information which charged defendant with committing a wilful and lewd act on the body of a minor child under 16 with the intent of arousing passion, setting forth the specific act complained of, sufficiently alleged a crime against nature, and a violation of former § 18-6607 (now 18-1508). *State v. Wall*, 73 Idaho 142, 248 P.2d 222 (1952).

Instructions.

The jurors in a case involving the prosecution of the infamous crime against nature were correctly instructed in substance that the testimony of an accomplice alone would not support a conviction, but there must be other evidence connecting the defendant with the crime, and this evidence might be furnished by the statements, admissions, or confession of the defendant. *State v. Larsen*, 81 Idaho 90, 337 P.2d 1, cert. denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

The jury in prosecution for alleged commission of infamous crime against nature was given adequate instructions which stated in substance that the confession might be considered only if the jury found it was made voluntarily by the defendant, without threats and without promise of reward or immunity, and even if the jury so concluded, the confession alone would not support conviction, but it should be considered along with all the other evidence in the case. *State v. Larsen*, 81 Idaho 90, 337 P.2d 1, cert. denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

Sentence.

Length of imprisonment in excess of five years is left to discretion of court. *In re Miller*, 23 Idaho 403, 129 P. 1075 (1913).

As this section prescribes the punishment, § 18-112 has no application and does not fix the maximum punishment. *In re Miller*, 23 Idaho 403, 129 P. 1075 (1913).

Where defendant abducted the victim at gunpoint from her car, struck her on the head when she refused to disrobe, and shot her twice when she attempted to escape, consecutive sentences for the maximum term of confinement on respective counts of second degree kidnapping, assault with intent to commit infamous crime against nature, attempt to commit infamous crime against nature, and assault with intent to commit murder were not excessive. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Where defendant's convictions for assault with intent to commit infamous crime against nature and attempt to commit infamous crime against nature arose out of the same act, the sentences imposed would be served concurrently. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Where the defendant used force and threats in his attempt to coerce the pregnant victim to fellate him, the brutal circumstances of the

assault with intent to commit the infamous crime against nature were sufficient to warrant his 14-year imprisonment sentence, and the sentence did not constitute cruel and unusual punishment even if one assumed that assault with intent to commit the infamous crime against nature was a lesser included offense of the infamous crime against nature, and that the maximum penalty for the infamous crime against nature was five years imprisonment. *State v. Goodrick*, 102 Idaho 811, 641 P.2d 998 (1982).

Concurrent indeterminate sentences of 20 years for rape, 15 years for burglary and five years for crime against nature were not unduly harsh and were not an abuse of discretion. *State v. Mahoney*, 107 Idaho 190, 687 P.2d 580 (Ct. App. 1984).

Where the defendant was sentenced to indeterminate, concurrent periods not to exceed 15 years for rape and five years for the infamous crime against nature, the trial court did not abuse its sentencing discretion, where the court found that the positive qualities of the offender were outweighed by the retribution and general deterrence objectives of sentencing. *State v. Hendricks*, 110 Idaho 846, 718 P.2d 1284 (Ct. App. 1986).

Infamous crime against nature does not require a minimum period of confinement of five years, but rather requires a minimum sentence of five years. *State v. Hayes*, 121 Idaho 232, 824 P.2d 163 (Ct. App. 1992).

A sentence of a minimum period of confinement of eight years for conviction of rape, burglary, kidnapping and the infamous crime against nature was not unreasonable where defendant was on probation at the time he committed the crimes, he violated a restraining order and had a prior criminal record. *State v. Lenwai*, 122 Idaho 258, 833 P.2d 116 (Ct. App. 1992).

Where the district court, on resentencing, did consider the mitigating factors which plaintiff relied upon for support that his sentence was excessive but also delineated aggravating factors and reemphasized the callousness shown by plaintiff by participating in throwing the victim, with his throat cut, down an embankment in the snow and abandoning him after the crime for which he had been convicted was perpetrated, the district court did not abuse its discretion in sentencing plaintiff to a 12-year term, with five-years fixed. *State v. Hayes*, 123 Idaho 26, 843 P.2d 675 (Ct. App. 1992).

Although defendant's prior criminal record consisted of only a few convictions for minor crimes and traffic offenses, since the crime consisted of a violent, forced sexual act, there was no abuse of discretion by the district court in arriving at the two-year term of a sentence of a five-year indeterminate term of incarceration with a two-year minimum pe-

riod of confinement. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (1994).

In prosecution for felony charge of infamous crime against nature, sentence of an indeterminate life term with a twenty-year minimum period of confinement was reasonable where defendant had history of violent and serious offenses, had convictions for robbery, assault and weapons offenses, had not finished any probationary supervision period without violation and revocation, admitted to the presentence evaluator other uncharged incidents, the psychological evaluation indicated he had an antisocial personality compounded by serious alcohol abuse and the evaluator felt that he was a poor candidate for improvement from rehabilitation. *State v. Dushkin*, 124 Idaho 184, 857 P.2d 663 (Ct. App. 1993).

The maximum sentence for the infamous crime against nature is left to the discretion of the trial court, and may extend to life imprisonment. *State v. Brashier*, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

Where the district court acted under an erroneous belief that the maximum authorized sentence for the infamous crime against nature was five years, and thereby incorrectly limited the scope of its discretion, case was properly remanded for a new sentencing. *State v. Brashier*, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

Under the facts of this case, defendant's incarceration was not attributable to the charge of infamous crime against nature until he was initially sentenced for that crime. *State v. Brashier*, 130 Idaho 112, 937 P.2d 424 (Ct. App. 1997).

Where trial court considered the violent and sexual nature of the crime and defendant's prior criminal conduct, and his history of alcohol abuse which indicated that he would be a risk to society, sentence of nine years was not an abuse of the court's discretion. *State v. Brashier*, 130 Idaho 112, 937 P.2d 424 (Ct. App. 1997).

Although five years is the minimum sentence under this section, this section does not require a minimum period of actual confinement of five years. A sentence imposed under this section may include a lesser minimum period of confinement together with an indeterminate term, so that the determinate and indeterminate terms together total five years or more. *State v. Hansen*, 130 Idaho 845, 949 P.2d 593 (Ct. App. 1997).

Standing.

Defendant had standing to challenge the constitutionality of this section, where his conviction was predicated on sexual acts which he engaged in with his wife and where defendant argued that the application of this section to his private, arguably consensual relations with his wife violated his right of privacy. *State v. Holden*, 126 Idaho 755, 890 P.2d 341 (Ct. App. 1995).

Statements.

—Defendant.

In prosecution for infamous crime against nature, where defendant was taken in a police car without being handcuffed or placed in restraints and was questioned in an interview room in which interview he made certain statements, where he voluntarily agreed to submit to a medical examination, and although hospital personnel noted he was returned to protective custody after the exam, there was nothing in the record to indicate the basis for such conclusion, and where police officers testified that defendant was always free to leave, and that the door to the interview room was not locked, the facts found by the trial court as testified to by the police officers were supported by substantial evidence that defendant was not in custody; thus, trial court correctly admitted statements defendant had made even though he had not been given proper Miranda warnings. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (1994).

18-6606. Crime against nature — Penetration. — Any sexual penetration, however slight, is sufficient to complete the crime against nature. [I.C., § 18-6606, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 363; R.S., R.C., & C.L., § 6811; C.S., § 8288; I.C.A., § 17-1813 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cited in: *State v. Maland*, 124 Idaho 830, 864 P.2d 668 (Ct. App. 1993).

ANALYSIS

Application.
Corroboration.
Evidence.
Information.
Statements.
—Defendant.
—Prosecutor.
Verdicts.

Application.

The act of fellatio is included within the statutory definition of crimes against nature. *State v. Izatt*, 96 Idaho 667, 534 P.2d 1107 (1975).

Corroboration.

The requirement of corroboration in sex crime cases is no longer the law in Idaho. *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981).

Evidence.

Where a rape victim was also forced to engage in fellatio which was a separate crime

—Prosecutor.

In prosecution for infamous crime against nature, statements by prosecutor in closing arguments were not impermissible and did not deprive defendant of a fair trial where, although such statements could have been better framed in less personal terms, such comments were not improper. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (1994).

Collateral References. 70C Am. Jur. 2d, Sodomy, § 1 et seq.

81 C.J.S., Sodomy, § 1 et seq.

Identity of accused, evidence of other offenses to prove. 22 A.L.R. 1021; 27 A.L.R. 357; 63 A.L.R. 602.

Reduction by appellate court of punishment imposed by trial court. 29 A.L.R. 332; 89 A.L.R. 295.

Consent as defense in prosecution for sodomy. 58 A.L.R.3d 636.

Entrapment defense in sex prosecution. 12 A.L.R.4th 413.

for which the defendant was not charged, the evidence relating to fellatio was admissible. *State v. Izatt*, 96 Idaho 667, 534 P.2d 1107 (1975).

Information.

Information which charged defendant with committing a wilful and lewd act on the body of a minor child under 16 with the intent of arousing passion, setting forth the specific act complained of, sufficiently alleged a crime against nature, and a violation of § 18-6607 (now § 18-1508). *State v. Wall*, 73 Idaho 142, 248 P.2d 222 (1952).

Statements.

—Defendant.

In prosecution for infamous crime against nature, where defendant was taken in a police car without being handcuffed or placed in restraints and was questioned in an interview room in which interview he made certain statements, where he voluntarily agreed to submit to a medical examination, and although hospital personnel noted he was returned to protective custody after the exam, there was nothing in the record to indicate the basis for such conclusion, and where police officers testified that defendant was always free to leave, and that the door to the interview room was not locked, the facts found by the trial court as testified to by the police officers were supported by substantial evi-

dence that defendant was not in custody. Thus, trial court correctly admitted statements defendant had made even though he had not been given proper Miranda warnings. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (1994).

—**Prosecutor.**

In prosecution for infamous crime against nature, statements by prosecutor in closing arguments were not impermissible and did not deprive defendant of a fair trial where,

although such statements could have been better framed in less personal terms, such comments were not improper. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (1994).

Verdicts.

Jury verdicts of guilty on a rape charge and not guilty as to an infamous crime against nature charge are rationally reconcilable and therefore were not impermissibly inconsistent. *State v. Lopez*, 126 Idaho 831, 892 P.2d 898 (Ct. App. 1995).

18-6607. [Amended and Redesignated.]

Compiler's notes. This section was amended and redesignated as § 18-1508 by § 2 of S.L. 1984, ch. 63.

18-6608. Forcible sexual penetration by use of foreign object. — Every person who, for the purpose of sexual arousal, gratification or abuse, causes the penetration, however slight, of the genital or anal opening of another person, by any object, instrument or device, against the victim's will by use of force or violence or by duress, or by threats of immediate and great bodily harm, accompanied by apparent power of execution, or where the victim is incapable, through any unsoundness of mind, whether temporary or permanent, of giving legal consent, or where the victim is prevented from resistance by any intoxicating, narcotic or anesthetic substance, shall be guilty of a felony and shall be punished by imprisonment in the state prison for not more than life. [I.C., § 18-6608, as added by 1983, ch. 176, § 1, p. 484; am. 2002, ch. 360, § 1, p. 1018.]

Cross ref. Medical examination of victim, cost paid by law enforcement agency, § [19-5303] 19-5302.

Sec. to sec. ref. This section is referred to in §§ 18-310, 18-7905, 18-8303, 18-8304, 18-8314, 19-5506, 20-525A, 39-1113 and 72-1025.

Cited in: *State v. Martinez*, 111 Idaho 281, 723 P.2d 825 (1986); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987).

ANALYSIS

“Any object” defined.

Sentence.

—Excessive.

“Any Object” Defined.

The phrase “any object” contained in this section is not ambiguous and includes such human body parts as a finger. *State v. Brown*, 123 Idaho 748, 852 P.2d 500 (Ct. App. 1993).

Sentence.

—**Excessive.**

District court abused its discretion by arriving at an unreasonably harsh sentencing structure of incarceration for sixty years without the possibility of parole for defendant's crimes of rape, forcible sexual penetration with a foreign object and robbery; totality of sentences was more than reasonably necessary to accomplish sentencing goals. Consecutive 25-year determinate terms modified to be served concurrently and consecutive 10-year determinate term for robbery modified to be made indeterminate. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

18-6609. Crime of video voyeurism. — (1) As used in this section:

(a) “Broadcast” means the electronic transmittal of a visual image with the intent that it be viewed by a person or persons.

- (b) "Disseminate" means to make available by any means to any person.
 - (c) "Imaging device" means any instrument capable of recording, storing, viewing or transmitting visual images.
 - (d) "Intimate areas" means the buttocks, genitals or genital areas of males or females, and the breast area of females.
 - (e) "Person" means any natural person, corporation, partnership, firm, association, joint venture or any other recognized legal entity or any agent or servant thereof.
 - (f) "Place where a person has a reasonable expectation of privacy" means:
 - (i) A place where a reasonable person would believe that he could undress, be undressed or engage in sexual activity in privacy, without concern that he is being viewed, photographed, filmed or otherwise recorded by an imaging device; or
 - (ii) A place where a person might reasonably expect to be safe from casual or hostile surveillance by an imaging device; or
 - (iii) Any public place where a person, by taking reasonable steps to conceal intimate areas, should be free from the viewing, recording, storing or transmitting of images obtained by imaging devices designed to overcome the barriers created by a person's covering of intimate areas.
 - (g) "Publish" means to:
 - (i) Disseminate with the intent that such image or images be made available by any means to any person; or
 - (ii) Disseminate with the intent that such images be sold by another person; or
 - (iii) Post, present, display, exhibit, circulate, advertise or allow access by any means so as to make an image or images available to the public; or
 - (iv) Disseminate with the intent that an image or images be posted, presented, displayed, exhibited, circulated, advertised or made accessible by any means and to make such image or images available to the public.
 - (h) "Sell" means to disseminate to another person, or to publish, in exchange for something of value.
- (2) A person is guilty of video voyeurism when, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or another person, or for his own or another person's lascivious entertainment or satisfaction of prurient interest, or for the purpose of sexually degrading or abusing any other person:
- (a) He uses, installs or permits the use or installation of an imaging device at a place where a person would have a reasonable expectation of privacy, without the knowledge or consent of the person using such place; or
 - (b) He intentionally disseminates, publishes or sells any image or images of the intimate areas of another person or persons without the consent of such other person or persons and with knowledge that such image or images were obtained with the intent set forth above.
- (3) A violation of this section is a felony. [I.C., § 18-6609, as added by 2004, ch. 122, § 1, p. 410.]

Compiler's notes. Section 2 of S.L. 2004, ch. 122 is compiled as § 18-8304.

Section 3 of S.L. 2004, ch. 122 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in § 18- 8304.

CHAPTER 67

COMMUNICATIONS SECURITY

SECTION.

- 18-6701. Definitions.
- 18-6702. Interception and disclosure of wire, electronic or oral communications prohibited.
- 18-6703. Manufacture, distribution, possession, and advertising of wire, electronic or oral communication intercepting devices prohibited.
- 18-6704. Confiscation of wire, electronic or oral communication intercepting devices.
- 18-6705. Prohibition of use as evidence of intercepted wire, electronic or oral communications.
- 18-6706. Authorization for interception of wire, electronic or oral communications.
- 18-6707. Authorization for disclosure and use of intercepted wire, electronic or oral communications.
- 18-6708. Procedure for interception of wire, electronic or oral communications.
- 18-6709. Recovery of civil damages authorized.
- 18-6710. Use of telephone to annoy, terrify, threaten, intimidate, harass or offend by lewd or profane language, requests, suggestions or proposals — Threats of physical harm — Disturbing the peace by repeated calls — Penalties.

SECTION.

- 18-6711. Use of telephone to terrify, intimidate, harass or annoy by false statements — Penalties.
- 18-6711A. False alarms — Complaints — Reports — Penalties — Civil damages.
- 18-6712. Place of offense.
- 18-6713. Theft of telecommunication services.
- 18-6714. Aiding the avoidance of telecommunications charges.
- 18-6715. Forgery of telegraphic messages.
- 18-6716. Opening telegrams.
- 18-6717. Refusal to send or deliver telegraph message.
- 18-6718. Opening sealed mail or packages.
- 18-6719. Definitions for pen registers and trap and trace devices.
- 18-6720. General prohibition on pen register and trap and trace device use — Exception.
- 18-6721. Application for an order for a pen register or a trap and trace device.
- 18-6722. Issuance of an order for a pen register or a trap and trace device.
- 18-6723. Assistance in installation and use of a pen register or a trap and trace device.
- 18-6724. [Repealed.]
- 18-6725. Rule for prior interceptions.

18-6701. Definitions. — Definitions as used in this chapter:

(1) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station), furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications.

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation but such term does not include any electronic communication.

(3) "Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device.

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, electronic or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facility or any component thereof:

(i) Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

(ii) Being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(5) "Person" means any employee or agent of the state or political subdivision thereof and any individual, partnership, association, joint stock company, trust, cooperative, or corporation.

(6) "Investigative or law enforcement officer" means any officer of the state of Idaho who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this chapter and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

(7) "Contents" when used with respect to any wire, electronic or oral communication includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(8) "Judge of competent jurisdiction" means a justice of the supreme court or a judge of a district court.

(9) "Aggrieved person" means a person who was a party to any illegally intercepted wire, electronic or oral communication or a person against whom the interception was illegally directed.

(10) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system, but does not include:

(a) Any wire or oral communication;

(b) Any communication made through a tone-only paging device;

(c) Any communication from a tracking device, as defined in 18 U.S.C. section 3117; or

(d) Electronic fund transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

(11) "User" means any person or entity who:

- (a) Uses an electronic communication service; and
- (b) Is authorized by the provider of such service to engage in such use.

(12) "Electronic communications system" means any wire, radio, electro-magnetic, photoelectronic or photooptical facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.

(13) "Electronic communication service" means any service that provides to the users thereof the ability to send or receive wire or electronic communications.

(14) "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not:

- (a) Scrambled or encrypted;
- (b) Transmitted using modulation techniques, the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication;
- (c) Carried on a subcarrier or other signal subsidiary to a radio transmission;
- (d) Transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or
- (e) Transmitted on frequencies set forth in 18 U.S.C. section 2510(16)(E).

(15) "Electronic storage" means:

- (a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
- (b) Any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

(16) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception. [I.C., § 18-6701, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 1, p. 631.]

Compiler's notes. Former §§ 18-6701 — 18-6712, which comprised I.C., §§ 18-6701 — 18-6712, as added by 1972, ch. 336, § 1, p. 844, were repealed by S.L. 1980, ch. 326, § 1.

Other former §§ 18-6701 — 18-6709, which comprised Cr. & P. 1864, § 117; 1893, p. 90, § 1; reen. 1899, p. 190, § 1; R.S., R.C., & C.L., §§ 7205 — 7207, 7166 — 7169, 8412; reen. R.C. & C.L., § 7173; C.S., §§ 8412, 8567 — 8570, 8574, 8584 — 8586; I.C.A., §§ 17-4501 — 17-4508, 17-4317 were repealed by S.L. 1972, ch. 143, § 5, effective January 1, 1972.

Other former §§ 18-6710, 18-6711 and 18-6712 which comprised S.L. 1965, ch. 298, §§ 1-3, p. 787; am. S.L. 1969, ch. 154, § 1, p. 481, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

Cited in: State v. Martin, 113 Idaho 461, 745 P.2d 1082 (Ct. App. 1987); State v. Brown, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987); State v. Thompson, 113 Idaho 466, 745 P.2d 1087 (Ct. App. 1987).

ANALYSIS

Conversation inside police department.
Cordless telephones.

Conversation Inside Police Department.

The trial court did not violate defendant's constitutional or statutory rights by considering evidence, during the sentencing proceedings, of a conversation between defendant and his parents recorded by an electronic monitoring system taping what was said in the police department booking room. State v. Wilkins, 125 Idaho 215, 868 P.2d 1231 (1994).

Cordless Telephones.

Since the definition of wire communication plainly includes "any communication made in whole or in part through the use" of the state's or nation's telecommunications system, exclusion of cordless telephone conversations from this definition would render the language meaningless. Hoskins v. Howard, 132 Idaho 311, 971 P.2d 1135 (1998).

Cordless telephone communications are protected wire communications under the Idaho Communications Security Act so long as some portion of the communications travel through the state's or nation's telecommuni-

cations network. *Hoskins v. Howard*, 132 Idaho 311, 971 P.2d 1135 (1998).

Collateral References. 86 C.J.S., Telegraphs, Telephones, Radio and Television, § 1 et seq.

18-6702. Interception and disclosure of wire, electronic or oral communications prohibited. — (1) Except as otherwise specifically provided in this chapter, any person shall be guilty of a felony and is punishable by imprisonment in the state prison for a term not to exceed five (5) years or by a fine not to exceed five thousand dollars (\$5,000), or by both fine and imprisonment if that person:

(a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication; or

(b) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication; or

(c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this subsection; or

(d) Willfully uses, or endeavors to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this subsection; or

(e) Intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, intercepted by means authorized by subsection (2)(b), (c), (f) or (g) of this section or by section 18-6708, Idaho Code, if that person:

(i) Knows or has reason to know that the information was obtained through the interception of such communication in connection with a criminal investigation; and

(ii) Has obtained or received the information in connection with a criminal investigation with the intent to improperly obstruct, impede or interfere with a duly authorized criminal investigation.

(2)(a) It is lawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not

utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It is lawful under this chapter for an officer, employee, or agent of the federal communications commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5, to intercept a wire, electronic or oral communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire, electronic or oral communication when such person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception.

(d) It is lawful under this chapter for a person to intercept a wire, electronic or oral communication when one (1) of the parties to the communication has given prior consent to such interception.

(e) It is unlawful to intercept any communication for the purpose of committing any criminal act.

(f) It is lawful under this chapter for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by an appropriate law enforcement agency or the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature.

(g) It is lawful under this chapter for an employee of a law enforcement agency, fire department or ambulance service, while acting in the scope of his employment, and while a party to the communication, to intercept and record incoming wire or electronic communications.

(h) It shall not be unlawful under this chapter for any person:

(i) To intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) To intercept any radio communication that is transmitted:

(A) By any station for the use of the general public, or that relates to ships, aircraft, vehicles or persons in distress;

(B) By any governmental, law enforcement, civil defense, private land mobile or public safety communications system, including police and fire, readily accessible to the public;

(C) By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or

(D) By any marine or aeronautical communication system;

(iii) To engage in any conduct that:

(A) Is prohibited by 47 U.S.C. section 553 (federal communications act of 1934); or

(B) Is excepted from the application of 47 U.S.C. section 605 (federal communications act of 1934);

(iv) To intercept any wire or electronic communication, the transmission of which is causing harmful interference to any lawfully operating

station or consumer electronic equipment to the extent it is necessary to identify the source of such interference; or

(v) For other users of the same frequency to intercept any radio communication, if such communication is not scrambled or encrypted, made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system.

(i) It shall be lawful under this chapter for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication or a user of that service from the fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in subsection (3)(b) of this section, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication other than to such person or entity or an agent thereof while in transmission on that service, to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

(i) As otherwise authorized in section 18-6707, Idaho Code, or subsection (2)(a) of this section;

(ii) With the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) If such contents were inadvertently obtained by the service provider and appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency. [I.C., § 18-6702, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 2, p. 631; am. 2004, ch. 303, § 1, p. 849.]

Compiler's notes. Former § 18-6702 was repealed. See compiler's notes, § 18-6701.

Statute of Limitations.

Based on its determination that in the case of wiretapping the damage is immediate, the Supreme Court of Idaho held that the statute of limitations begins to run no later than the last day of wiretapping. *Knudsen v. Agee*, 128 Idaho 776, 918 P.2d 1221 (1996).

Collateral References. 29 Am. Jur. 2d, Evidence, §§ 589 — 608.

86 C.J.S., Telegraphs, Telephones, Radio and Television, §§ 117, 122, 154.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) authorizing civil cause of action by person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of Act. 164 A.L.R. Fed. 139.

18-6703. Manufacture, distribution, possession, and advertising of wire, electronic or oral communication intercepting devices prohibited. — (1) Except as otherwise specifically provided in this chapter any person who willfully:

(a) Sends through the mail or sends or carries any electronic, mechanical, or other device, with the intention of rendering it primarily useful for the

purpose of the illegal interception of wire, electronic or oral communications as specifically defined by this chapter; or

(b) Manufactures, assembles, possesses, or sells any electronic, mechanical, or other device with the intention of rendering it primarily useful for the purpose of the illegal interception of wire, electronic or oral communications as specifically defined by this chapter, shall be guilty of a felony and is punishable by imprisonment in the state penitentiary for a term of five (5) years or by a fine of five thousand dollars (\$5,000), or by both such fine and imprisonment.

(2) It is lawful under this section for:

(a) A provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of business; or

(b) An officer, agent, or employee of, or a person under contract with, bidding upon contracts with, or in the course of doing business with, the United States, a state, or a political subdivision thereof, in the normal course of the activities of the United States, a state, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, electronic or oral communication.

(3) It shall not be unlawful under this section to advertise for sale a device described in subsection (1) of this section if the advertisement is mailed, sent or carried solely to a domestic provider of wire or electronic communication service or to an agency of the United States, any state, or a political subdivision thereof that is duly authorized to use such device. [I.C., § 18-6703, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 3, p. 631.]

Compiler's notes. Former § 18-6703 was repealed. See compiler's notes, § 18-6701.

Cited in: State v. Jagers, 117 Idaho 559, 789 P.2d 1150 (Ct. App. 1990).

Collateral References. 29 Am. Jur. 2d, Evidence, §§ 609—625.

74 Am. Jur. 2d, Telecommunications, §§ 188, 194 — 195.

86 C.J.S. Telegraphs, Telephones, Radio and Television, § 122.

Validity, construction, and effect of state

legislation making wiretapping a criminal offense. 74 A.L.R.2d 855.

What constitutes an "interception" of a telephone or similar communication forbidden by the federal communications act or similar state statutes. 9 A.L.R.3d 423.

Eavesdropping as violating right of privacy. 11 A.L.R.3d 1296.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence. 79 A.L.R.3d 79.

18-6704. Confiscation of wire, electronic or oral communication intercepting devices. — Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, or sold in violation of this chapter may be seized and forfeited to the state. [I.C., § 18-6704, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 4, p. 631.]

Compiler's notes. Former § 18-6704 was repealed. See compiler's notes, § 18-6701.

18-6705. Prohibition of use as evidence of intercepted wire, electronic or oral communications. — Whenever any wire, electronic or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. [I.C., § 18-6705, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 5, p. 631.]

Compiler's notes. Former § 18-6705 was repealed. See compiler's notes, § 18-6701.

Cited in: *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987).

DECISIONS UNDER PRIOR LAW

Validity of Actions.

Where an investigating officer attached a suction cup listening device to his phone to record a conversation relating to his investigation and did not make any contact with the telephone wire, nor did he intercept a mes-

sage intended for another person, the officer did not violate the terms of the former section in recording such a conversation. *State v. Couch*, 103 Idaho 205, 646 P.2d 447 (Ct. App. 1982).

18-6706. Authorization for interception of wire, electronic or oral communications. — The prosecuting attorney of any county is authorized to make application to a judge of competent jurisdiction for an order authorizing or approving the interception of wire, electronic or oral communications and may apply to such judge for, and such judge may grant in conformity with section 2581[2518] of chapter 119, title 18 U.S.C.A., and in conformity with the provisions of this chapter, an order authorizing or approving the interception of wire, electronic or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one (1) year, or any conspiracy to commit any of the foregoing offenses. [I.C., § 18-6706, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 6, p. 631.]

Compiler's notes. Former § 18-6706 was repealed. See compiler's notes, § 18-6701.

The bracketed number "2518" was inserted by the compiler.

Sec. to sec. ref. This section is referred to in § 18-6708.

Cited in: *State v. Thompson*, 113 Idaho 466, 745 P.2d 1087 (Ct. App. 1987).

Collateral References. Admissibility of evidence obtained by government or other public officer by intercepting letter or telegram or telephone message. 53 A.L.R. 1485; 66 A.L.R. 397; 134 A.L.R. 614.

18-6707. Authorization for disclosure and use of intercepted wire, electronic or oral communications. — (1) Any investigative or

law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, electronic or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of this state, of the United States or of any state or in any political subdivision thereof.

(4) No otherwise privileged wire, electronic or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, electronic or oral communications in the manner authorized herein, intercepts wire, electronic or oral communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1), (2) and (3) of this section. [I.C., § 18-6707, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 7, p. 631.]

Compiler's notes. Former § 18-6707 was repealed. See compiler's notes, § 18-6701.

18-6708. Procedure for interception of wire, electronic or oral communications. — (1) Each application for an order authorizing the interception of a wire, electronic or oral communication shall be made in writing upon oath or affirmation or by means of an oral affidavit as provided for in the Idaho Rules of Criminal Practice & Procedure to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) The identity of the individual authorized to make application for said order pursuant to section 18-6706, Idaho Code;

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11) of this section, a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be

intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) A full and complete statement of the facts concerning all previous applications known to the individual making the applications, made to any judge for authorization to intercept wire, electronic or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing interception of wire, electronic or oral communications within the state of Idaho if the judge determines on the basis of the facts submitted by the applicant that:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 18-6706,* Idaho Code;

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) Except as provided in subsection (11) of this section, there is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing the interception of any wire, electronic or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications, and of the person making the application; and

(e) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian, or other person shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian or person is providing the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

(6) No order entered under this section may authorize the interception of any wire, electronic or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty (30) days. Such thirty (30) day period begins on the earlier of the day on which the investigative or law enforcement officer begins to conduct an interception under the order or ten (10) days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The periods of extension shall be no longer than the authorizing court deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty (30) days for each extension. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty (30) days. In the event the intercepted communication is in a code or foreign language and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by government personnel or by an individual operating under a contract with federal, state or local government and acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(7) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(8)(a) The contents of any wire, electronic or oral communication intercepted by any means authorized by this chapter shall, if possible, be

recorded on tape or wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying court and in any event shall be kept for ten (10) years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 18-6707, Idaho Code, for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic or oral communication or evidence derived therefrom under subsection (3) of section 18-6707, Idaho Code.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge and in any event shall be kept for ten (10) years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety (90) days after the filing of an application for an order of approval under this section which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of:

- (1) The fact of the entry of the order or the application;
- (2) The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
- (3) The fact that during the period wire, electronic or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire, electronic or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a federal or state court unless each party, not less than ten (10) days before the trial, hearing, or proceeding has been furnished with a copy of the court order and accompanying application under which the interception was authorized. This ten (10) day period may be waived by the court if it finds that it was not

possible to furnish the party with the above information ten (10) days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a state, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted;
2. The order of authorization under which it was intercepted is insufficient on its face; or
3. The interception was not made in conformity with the order of authorization.

Such motion shall be made before the trial, hearing, or proceeding, pursuant to the Idaho rules of criminal or civil procedure or the hearing rules of the respective body, as applicable.

(b) In addition to any other right to appeal, the state of Idaho shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection. Such appeal shall be taken within thirty (30) days after the date the order was entered.

(c) The remedies and sanctions described in this section with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if:

(a) In the case of an application with respect to the interception of an oral communication:

- (i) The application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and
- (ii) The judge finds that such specification is not practical; and

(b) In the case of an application with respect to a wire or electronic communication:

- (i) The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;
- (ii) The judge finds that such showing has been adequately made; and
- (iii) The order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do

not apply by reason of subsection (11)(a) of this section shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) of this section may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the state, shall decide such a motion expeditiously. [I.C., § 18-6708, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 8, p. 631.]

Compiler's notes. Former § 18-6708 was repealed. See compiler's notes, § 18-6701.

ANALYSIS

Appeal.

Application and affidavit.

—Contents.

—Sufficient.

Challenge of evidence.

Minimization.

Order.

—Extension.

Probable cause.

Appeal.

The Court of Appeals' standard of review of the necessity for a wiretap is bifurcated. It exercises free review over whether a full and complete statement of necessity was submitted to the issuing judge; however, it exercises deferential review on the question whether an adequate showing of necessity has been made. *State v. Martin*, 113 Idaho 461, 745 P.2d 1082 (Ct. App. 1987); *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

The proper task on appeal of a wiretap order is to determine only whether the facts set forth in the application were minimally adequate to support the determination that was made; "minimally" means that the issuing judge must have had a substantial basis to conclude that the statutory requirements for a wiretap were satisfied. *State v. Martin*, 113 Idaho 461, 745 P.2d 1082 (Ct. App. 1987).

Application and Affidavit.

—Contents.

Necessity must be readily apparent from the affidavit in support of the wiretap application. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

The affidavit for the wiretap need not demonstrate that every conceivable alternative has been exhausted, but neither may the courts accept bald conclusory statements concerning necessity. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

The affidavit and application supported the wiretap order, where they presented an adequate statement as to which regular investigative techniques had been tried and which had failed, the affidavit indicated what progress has been made prior to applying for the wiretap, and the affidavit indicated the areas in which the investigation, using ordinary techniques, had not turned up the evidence sought. *State v. Martin*, 113 Idaho 461, 745 P.2d 1082 (Ct. App. 1987).

—Sufficient.

The affidavit in support of the wiretap complied with the plain meaning of subdivision (1)(c) of this section, and the facts set forth were adequate to support the issuing judge's determination under subdivision (3)(c) of this section, where it presented a complete statement as to why regular investigative techniques, though minimally successful, had largely failed, and the recitation of procedures tried and failed was extensive. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Challenge of Evidence.

Where all of the defendants were parties, at one time or another, to the conversations intercepted by wiretap, they had standing to challenge the wiretap evidence under subdivision (10)(a) of this section. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Minimization.

Where roughly 700 completed calls were made during the course of the wiretap, nearly 400 of those calls were of less than two minutes' duration, and of the 300 calls exceeding two minutes, the officers minimized in two-thirds of them, the minimization efforts were reasonable and adequate in light of the circumstances. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

The police complied with the minimization requirements of subsection (6) of this section, where the order authorizing the wiretap included a minimization provision which closely

tracked the language of this section, and although there was no judicial supervision of minimization procedures, the prosecutor in charge of the investigation met with all participating officers, provided them with detailed written guidelines of procedures to be followed, and received daily progress reports from the officer in charge. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

The purpose of the minimization requirement of subsection (6) of this section is to prevent the improper invasion of a target's privacy rights and to curtail the indiscriminate seizure of communications. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Among the factors to be considered in determining whether a minimization provision has been violated are the nature and use of the telephone being tapped, the nature of the crime, the scope of the investigation, and whether patterns of non-criminal calls have been established over the course of the surveillance. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

The government, once challenged, bears the initial burden of showing compliance with minimization requirements of subsection (6) of this section. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Order.

—Extension.

Where the authorized objective of the first wiretap was to seek information about actual places, dates and times of the drug transac-

tions, the officer in charge of the investigation stated during the preliminary hearing that such physical evidence had been lacking throughout the initial period of surveillance, and his testimony was not controverted, the issuing judge acted appropriately in extending the wiretap for an additional thirty days. *State v. Brown*, 113 Idaho 480, 745 P.2d 1101 (Ct. App. 1987), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Probable Cause.

The fact that an investigation has been partially successful, using ordinary investigative techniques, does not preclude a finding of necessity for a wiretap because there may be other important investigative objectives which are unattainable except by resort to electronic surveillance. *State v. Martin*, 113 Idaho 461, 745 P.2d 1082 (Ct. App. 1987).

At minimum, the judge issuing a wiretap order should address each of the elements prescribed by subsection (3) of this section. *State v. Martin*, 113 Idaho 461, 745 P.2d 1082 (Ct. App. 1987).

Excluding the information obtained through the use of the pen register, there was not a substantial basis for belief that particular communications concerning the offense of dealing in marijuana would be obtained through the wiretap or that the defendant's phone was being used, or was about to be used, in connection with the commission of the offense, as required by subdivisions (3)(b) and (3)(d) of this section. *State v. Thompson*, 114 Idaho 746, 760 P.2d 1162 (1988).

The "totality of circumstances" analysis is appropriate for determining probable cause under §§ 18-6701 — 18-6708. *State v. Thompson*, 114 Idaho 746, 760 P.2d 1162 (1988).

18-6709. Recovery of civil damages authorized. — Any person whose wire, electronic or oral communication is intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses, uses, or procures any other person to intercept, disclose, or use such communications, and shall be entitled to recover from any such person:

(a) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars (\$100) a day for each day of violation or one thousand dollars (\$1,000), whichever is higher;

(b) Punitive damages; and

(c) A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action under the laws of this state. [I.C., § 18-6709, as added by 1980, ch. 326, § 2, p. 832; am. 2002, ch. 223, § 9, p. 631.]

Compiler's notes. Former § 18-6709 was repealed. See compiler's notes, § 18-6701.

ANALYSIS

Interception of cordless communication.
Statute of limitations.

Interception of Cordless Communication.

Where the defendants, by their own admissions, used a radio scanner to intercept a wire communication, namely a cordless telephone conversation, and where they willfully recorded this communication and disclosed it to others, the district judge erred in granting summary judgment in their favor. *Hoskins v. Howard*, 132 Idaho 311, 971 P.2d 1135 (1998).

Statute of Limitations.

Based on its determination that in the case of wiretapping the damage is immediate, the Supreme Court of Idaho held that the statute

of limitations begins to run no later than the last day of wiretapping. *Knudsen v. Agee*, 128 Idaho 776, 918 P.2d 1221 (1996).

Where employee brought an action against employer alleging violation of the Idaho Communications Security Act for secretly recording her telephone conversations, district court correctly held that no discovery exception to the statute of limitations was created by the Idaho Communication Security Act; employee brought the action more than three years after the last day of wiretapping occurred. *Knudsen v. Agee*, 128 Idaho 776, 918 P.2d 1221 (1996).

Collateral References. Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) authorizing civil cause of action by person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of Act. 164 A.L.R. Fed. 139.

18-6710. Use of telephone to annoy, terrify, threaten, intimidate, harass or offend by lewd or profane language, requests, suggestions or proposals — Threats of physical harm — Disturbing the peace by repeated calls — Penalties. — (1) Every person who, with intent to annoy, terrify, threaten, intimidate, harass or offend, telephones another and (a) addresses to or about such person any obscene, lewd or profane language, or makes any request, suggestion or proposal which is obscene, lewd, lascivious or indecent; or (b) addresses to such other person any threat to inflict injury or physical harm to the person or property of the person addressed or any member of his family, or any other person; or (c) by repeated anonymous or identified telephone calls whether or not conversation ensues, disturbs the peace or attempts to disturb the peace, quiet, or right of privacy of any person at the place where the telephone call or calls are received, is guilty of a misdemeanor and upon conviction thereof, shall be sentenced to a term of not to exceed one (1) year in the county jail. Upon a second or subsequent conviction, the defendant shall be guilty of a felony and shall be sentenced to a term of not to exceed five (5) years in the state penitentiary.

(2) The use of obscene, lewd or profane language or the making of a threat or obscene proposal, or the making of repeated anonymous telephone calls as set forth in this section may be prima facie evidence of intent to annoy, terrify, threaten, intimidate, harass or offend.

(3) For the purposes of this section, the term "telephone" shall mean any device which provides transmission of messages, signals, facsimiles, video images or other communication between persons who are physically separated from each other by means of telephone, telegraph, cable, wire or the projection of energy without physical connection. [I.C., § 18-6710, as added by 1980, ch. 326, § 2, p. 832; am. 1994, ch. 167, § 5, p. 374.]

Compiler's notes. Former § 18-6710 was repealed. See compiler's notes, § 18-6701.

Section 4 of S.L. 1994, ch. 167 is compiled as § 18-6409.

Sec. to sec. ref. This section is referred to in §§ 18-920 and 63-3076.

ANALYSIS

Constitutionality.

Identification.

Sufficiency of evidence.

Constitutionality.

This section is neither facially overbroad nor void for vagueness. *State v. Richards*, 127 Idaho 31, 896 P.2d 357 (Ct. App. 1995).

Identification.

In regard to adequately identifying the party placing a call for purposes of introducing the import of the caller's conversation into evidence against him, the most usual, if not the most reliable mode of identification, is the recognition of the caller's voice by the witness receiving the call who intends to relate the conversation. This same means of identification is sufficient to identify the accused as the caller for purposes of this section. *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987).

Sufficiency of Evidence.

Substantial and competent evidence supported the jury's verdict convicting defendant of one count of misusing a telephone, where in addition to the two identification witnesses,

the state offered a panoply of circumstantial evidence linking the defendant to the alleged crime. *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987).

Because the requisite intent under § 18-6710 had to exist at the time a telephone call was initiated, and given that defendant called a police officer a profane name 21 seconds into the conversation, defendant had the requisite intent and was properly convicted under the statute; defendant's sentence of a one-year jail term, with 315 days suspended, and probation for two years was not excessive or unreasonable. *State v. Adams*, 138 Idaho 624, 67 P.3d 103 (Ct. App. 2003).

Collateral References. 86 C.J.S., Telegraphs, Telephones, Radio and Television, § 121.

Admissibility of evidence of fact making or receiving telephone calls. 13 A.L.R.2d 1409.

Misuse of telephone as minor criminal offense. 97 A.L.R.2d 503; 95 A.L.R.3d 411.

Right of telephone or telegraph company to refuse, or discontinue service because of use of improper language. 32 A.L.R.3d 1041.

Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy. 56 A.L.R.3d 457.

Validity and construction of "terroristic threat" statutes. 45 A.L.R.4th 949.

18-6711. Use of telephone to terrify, intimidate, harass or annoy by false statements — Penalties. — (1) Every person who telephones another and knowingly makes any false statements concerning injury, death, disfigurement, indecent conduct or criminal conduct of the person telephoned or any member of his family, with intent to terrify, intimidate, harass or annoy the called person, is guilty of a misdemeanor. Upon a second or subsequent conviction of the violation of the provisions of this section, the defendant shall be guilty of a felony.

(2) The making of a false statement as herein set out may be prima facie evidence of intent to terrify, intimidate, harass or annoy.

(3) For the purposes of this section, the term "telephone" shall mean any device which provides transmission of messages, signals, facsimiles, video images or other communication between persons who are physically separated from each other by means of telephone, telegraph, cable, wire or the projection of energy without physical connection. [I.C., § 18-6711, as added by 1980, ch. 326, § 2, p. 832; am. 1994, ch. 167, § 6, p. 374.]

Compiler's notes. Former § 18-6711 was repealed. See compiler's notes, § 18-6701.

Section 7 of S.L. 1994, ch. 167 is compiled as § 18-6718.

18-6711A. False alarms — Complaints — Reports — Penalties — Civil damages. — (a) Any person calling the number "911" for the purpose of making a false alarm or complaint and reporting false information which could or does result in the emergency response of any firefighting, police,

medical or other emergency services shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to a fine of not to exceed five hundred dollars (\$500) or to a term of not to exceed one (1) year in the county jail, or to both such fine and imprisonment.

(b) In addition to the criminal penalties for violation of the provisions of this section, civil damages may be recovered from the person so convicted in an amount of three (3) times the amount necessary to compensate or reimburse the complainant for costs incurred, losses sustained or other damages suffered in receiving, acting upon or responding to the false alarm, complaint or report. If the person so convicted is under the age of eighteen (18) years of age, the parent or legal guardian having legal custody of the minor may be jointly and severally liable with the minor for such civil damages as are imposed. Recovery from the parents or legal guardian shall not be limited by any other provision of law which limits the liability of a parent or legal guardian for the tortious or criminal conduct of a minor. A parent or guardian not having legal custody of the minor shall not be liable for civil damages imposed hereunder. [I.C., § 18-6711A, as added by 1990, ch. 133, § 1, p. 306.]

18-6712. Place of offense. — Any offense committed by use of a telephone as provided by this chapter may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received. [I.C., § 18-6712, as added by 1980, ch. 326, § 2, p. 832.]

Compiler's notes. Former § 18-6712 was repealed. See compiler's notes, § 18-6701.

18-6713. Theft of telecommunication services. — (1) As used in this section:

(a) "Clone cellular telephone" or "counterfeit cellular telephone" is a cellular telephone whose electronic serial number has been altered from the electronic serial number that was programmed in the telephone by the manufacturer by someone other than the manufacturer.

(b) "Cloning paraphernalia" means materials that, when possessed in combination, are capable of creating a cloned cellular telephone. These materials include: scanners to intercept the electronic serial number and mobile identification number, cellular telephones, cables, EPROM chips, EPROM burners, software for programming the cloned phone with a false electronic serial number and mobile identification number combination, a computer containing such software and lists of electronic serial number and mobile identification number combinations.

(c) "Electronic serial number" means the unique number that was programmed into a cellular telephone by its manufacturer which is transmitted by the cellular phone and used by cellular telephone providers to validate radio transmissions to the system as having been made by an authorized device.

(d) "EPROM" or "erasable programmable read-only memory" means an integrated circuit memory that can be programmed from an external source and erased, for reprogramming, by exposure to ultra-violet light.

(e) "Illegal telecommunications equipment" means any instrument, apparatus, equipment, or device which is designed or adapted, and otherwise used or intended to be used for the theft of any telecommunication service or for concealing from any supplier of telecommunication service or lawful authority the existence, place of origin, use or destination of any telecommunication.

(f) "Intercept" means to electronically capture, record, reveal or otherwise access the signals emitted or received during the operation of a cellular telephone without the consent of the sender or receiver of the signals, by means of any instrument, device or equipment.

(g) "Mobile identification number" means the cellular telephone number assigned to the cellular telephone by the cellular telephone carrier.

(h) "Possess" means to have physical possession or otherwise to exercise dominion or control over tangible property.

(i) "Telecommunication service" means a service which, in exchange for a pecuniary consideration, provides or offers to provide transmission of messages, signals, facsimiles, video images or other communication between persons who are physically separated from each other by means of telephone, telegraph, cable, wire, or the projection of energy without physical connection.

(2) It is unlawful intentionally to:

(a) Make illegal telecommunications equipment; or

(b) Sell, give, or furnish to another or advertise or offer for sale illegal telecommunications equipment; or

(c) Sell, give, or furnish to another or advertise or offer for sale any plans or instructions for making, assembling, or using illegal telecommunications equipment; or

(d) Use or possess illegal telecommunications equipment.

(3) It is unlawful intentionally to:

(a) Make clone cellular telephones; or

(b) Sell, give or furnish to another or advertise or offer for sale clone cellular telephones; or

(c) Sell, give or furnish to another or advertise or offer for sale any plans or instructions for making, assembling, or using clone cellular telephones; or

(d) Use or possess illegal cloning paraphernalia; or

(e) Use a clone cellular telephone or counterfeit telephone to facilitate the commission of a felony.

(4) It is theft of telecommunications services to use, receive, or control telecommunications services without paying the pecuniary consideration regularly charged by the supplier of the telecommunication services used, received or controlled.

(a) Actual knowledge by the supplier of the telecommunication services that a person is or has been using, receiving or controlling the services shall not be a defense to the crime of theft of telecommunication services.

(5) A person who violates the provisions of subsection (2)(d) of this section commits a crime and shall be punished as follows:

(a) The first conviction shall be a misdemeanor, which shall be punished by a fine not to exceed three hundred dollars (\$300) or by imprisonment in the county jail for a term not to exceed six (6) months, or by both such fine and imprisonment.

(b) Conviction of a second or subsequent violation shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a term not to exceed one (1) year, or by both such fine and imprisonment.

(6) A person who violates the provisions of either subsections (2) (a), (b) or (c) of this section commits a misdemeanor and shall be punished by a fine not to exceed one thousand dollars (\$1,000), or by imprisonment in the county jail for a term not to exceed one (1) year, or by both such fine and imprisonment.

(7) A person who violates the provisions of subsection (3) of this section commits a felony.

(8) In a prosecution for violation of the provisions of subsection (2), (3) or (4) of this section, the element of intent may be established by proof that the defendant obtained such services by any of the following means:

(a) By use of a code, prearranged scheme, or other similar stratagem or device whereby said person, in effect, sends or receives information;

(b) Without the consent of the supplier of the telecommunication services, the installation, connection, or alteration of any equipment, cable, wire, antenna or facilities capable of either physically, inductively, acoustically, or electronically enabling a person to use, receive or control telecommunication services without paying the regular pecuniary charge;

(c) By any other trick, stratagem, impersonation, false pretense, false representation, false statement, contrivance, device, or means; or

(d) By making, assembling, or possessing any instrument, apparatus, equipment, or device or the plans or instructions for the making or assembling of any instrument, apparatus, equipment, or device which is designed, adapted, or otherwise used or intended to be used to avoid the lawful charge, in whole or in part, for any telecommunications service by concealing the use, existence, place of origin, or destination of any telecommunications.

(9) The supplier of telecommunication services which is directly affected by the commission of any of the acts prohibited under subsections (2), (3) and (4) of this section shall, regardless of whether there was a criminal conviction, have a civil cause of action against the person who commits any of the prohibited acts. The prevailing party shall be awarded all reasonable costs of litigation, including but not limited to, attorney's fees and court costs. If the supplier prevails, he shall recover additionally:

(a) Actual damages; or

(b) Liquidated damages of ten dollars (\$10.00) per day for each day of the violation or five hundred dollars (\$500), whichever is greater; or

(c) If actual damages are greater than five hundred dollars (\$500), and, if proven, punitive damages.

(10) Nothing in this section shall be construed to make unlawful the interception or receipt by any person or the assisting, including the manufacture or sale, of such interception or receipt, of any satellite cable programs for private viewing as defined and specifically permitted under the Cable Communications Policy Act of 1984. [I.C., § 18-6713, as added by 1980, ch. 326, § 2, p. 832; am. 1985, ch. 32, § 1, p. 64; am. 1988, ch. 354, § 1, p. 1055; am. 1997, ch. 144, § 1, p. 417.]

Compiler's notes. The Cable Communications Policy Act of 1984, referred to in subsection (8) of this section, is compiled as 15 U.S.C. § 21; 18 U.S.C. § 2511; 46 U.S.C. §§ 484-487; 47 U.S.C. §§ 35, 152, 224, 309,

521, 522, 531-533, 541-547, 551-559, 601-611, 50 U.S.C. § 1805.

Sec. to sec. ref. This section is referred to in § 18-7803.

18-6714. Aiding the avoidance of telecommunications charges. —

(1) A person commits the offense of aiding the avoidance of telecommunications charges when he:

(a) Publishes the number or code of an existing, canceled, revoked, expired, or nonexistent credit card or the numbering or coding which is employed in the issuance of credit cards with the purpose that it will be used to avoid the payment of lawful telecommunications charges; or

(b) Publishes, advertises, sells, gives, or otherwise transfers to another plans or instructions for the making or assembling of any apparatus, instrument, equipment, or device described in section 18-6713, Idaho Code, with the purpose that such will be used or with the knowledge or reason to believe that such will be used to avoid the payment of lawful telecommunications charges.

(2) A person convicted of the offense of aiding the avoidance of telecommunications charges shall be punished according to the provisions of section 18-6713, Idaho Code.

(3) For the purposes of this section, the term "publish" means to communicate information to any one or more persons either orally; in person; by telephone, radio, or television; or in a writing of any kind. [I.C., § 18-6714, as added by 1980, ch. 326, § 2, p. 832; am. 1997, ch. 144, § 2, p. 417.]

18-6715. Forgery of telegraphic messages. — Every person who knowingly and willfully sends by telegraph to any person a false or forged message purporting to be from such telegraph office, or from any other person, or who willfully delivers or causes to be delivered to any person any such message falsely purporting to have been received by telegraph, or who furnishes or conspires to furnish, or causes to be furnished to any agent, operator, or employee, to be sent by telegraph or to be delivered, any such message, knowing the same to be false or forged with the intent to deceive, injure, or defraud another, is punishable by imprisonment in the state prison for a term not to exceed five (5) years, or by a fine not to exceed five thousand dollars (\$5,000), or by both such fine and imprisonment. [I.C., § 18-6715, as added by 1980, ch. 326, § 2, p. 832.]

18-6716. Opening telegrams. — Every person not connected with any telegraphic office who without the authority or consent of the person to

whom the same may be directed, willfully opens any sealed envelope enclosing a telegraphic message and addressed to any other person, with the purpose of learning the contents of such message, or who fraudulently represents any other person, and thereby procures to be delivered to himself any telegraphic message addressed to such other person, with the intent to use, destroy or detain the same from the person or persons entitled to receive such message, is punishable as provided in section 18-6715, Idaho Code. [I.C., § 18-6716, as added by 1980, ch. 326, § 2, p. 832.]

18-6717. Refusal to send or deliver telegraph message. — Every agent, operator or employee of any telegraph office who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph, is guilty of a misdemeanor. Nothing herein contained shall be construed to require any message to be received, transmitted or delivered unless the charges thereon have been paid or tendered. [I.C., § 18-6717, as added by 1980, ch. 326, § 2, p. 832.]

18-6718. Opening sealed mail or packages. — (1) Every person who willfully opens or breaks the seal, or reads, or causes to be read, any sealed mail not addressed to such person without being authorized to do so either by the writer or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such mail knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

(2) For the purposes of this section, “mail” means any written communication or package that is designed to be carried by the United States postal service or any other federally regulated carrier of packages, parcels or letters. [I.C., § 18-6718, as added by 1980, ch. 326, § 2, p. 832; am. 1994, ch. 167, § 7, p. 374.]

Compiler’s notes. Section 3 of S.L. 1980, ch. 326 read: “The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declara-

tion shall not affect the validity of remaining portions of this act.”

Sections 6 and 8 of S.L. 1994, ch. 167 are compiled as §§ 18-6711 and 18-7029, respectively.

18-6719. Definitions for pen registers and trap and trace devices.

— (1) “Attorney general” means the attorney general of the state of Idaho;

(2) “Pen register” means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but such term does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business;

(3) “Prosecuting attorney” means the prosecuting attorney of each county of the state of Idaho;

(4) "Trap and trace device" means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted. [I.C., § 18-6719, as added by 1987, ch. 215, § 1, p. 460.]

Cited in: State v. Thompson, 113 Idaho 466, 745 P.2d 1087 (Ct. App. 1987).

ANALYSIS

Probable cause.

— Good faith.

Probable Cause.

— Good Faith.

When pen registers were ordered on phones of persons suspected of selling marijuana,

state officers acted in accordance with Idaho law as it then existed which did not require that prosecutors show probable cause in their applications. Suppression of application was not required because the state officers relied in good faith on existing Idaho law when the pen registers were ordered. United States v. Butz, 982 F.2d 1378 (9th Cir.), cert. denied, 510 U.S. 891, 114 S. Ct. 250, 126 L. Ed. 2d 203 (1993).

18-6720. General prohibition on pen register and trap and trace device use — Exception. — (1) Except as provided in section 18-6720, Idaho Code, [this section] no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 18-6722, Idaho Code.

(2) The prohibition of subsection (1) of this section does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service:

(a) Relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service; or

(b) To record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(c) Where the consent of the user of that service has been obtained.

(3) Whoever knowingly violates the provisions of subsection (1) of this section shall be guilty of a misdemeanor. [I.C., § 18-6720, as added by 1987, ch. 215, § 2, p. 460.]

Compiler's notes. The bracketed words "this section" in subsection (1) were inserted by the compiler.

18-6721. Application for an order for a pen register or a trap and trace device. — (1) The prosecuting attorney or attorney general may make application for an order or an extension of an order under section 18-6722, Idaho Code, authorizing or approving the installation and use of a pen register or a trap and trace device under this chapter, in writing under oath or equivalent affirmation to the district court.

(2) An application under subsection (1) of this section shall include:

- (a) The identity of the prosecuting attorney or attorney general making the application and the identity of the law enforcement agency conducting the investigation; and
- (b) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency. [I.C., § 18-6721, as added by 1987, ch. 215, § 3, p. 460.]

18-6722. Issuance of an order for a pen register or a trap and trace device. — (1) Upon an application made under section 18-6721, Idaho Code, the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the prosecuting attorney, the attorney general, or the state law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

(2) An order issued under this section:

(a) Shall specify —

- 1. The identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached;
- 2. The identity, if known, of the person who is the subject of the criminal investigation;
- 3. The number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order; and
- 4. A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates; and

(b) Shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under section 18-6723, Idaho Code.

(3) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed sixty (60) days. Extensions of such an order may be granted, but only upon an application for an order under section 18-6721, Idaho Code, and upon the judicial finding required by subsection (1) of this section. The period of extension shall be for a period not to exceed sixty (60) days.

(4) An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

- (a) The order be sealed until otherwise ordered by the court; and
- (b) The person owning or leasing the line to which the pen register or a trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court. [I.C., § 18-6722, as added by 1987, ch. 215, § 4, p. 460.]

Sec. to sec. ref. This section is referred to in § 18-6720.

18-6723. Assistance in installation and use of a pen register or a trap and trace device. — (1) Upon the request of the prosecuting attorney or attorney general, or an officer of a law enforcement agency authorized to install and use a pen register, a provider of wire or electronic communication service, landlord, custodian, or other person shall furnish the applicant, investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if such assistance is directed by a court order as provided in section 18-6722, Idaho Code.

(2) Upon the request of a prosecuting attorney or attorney general, or an officer of a law enforcement agency authorized to receive the results of a trap and trace device, a provider of a wire or electronic communication service, landlord, custodian, or other person shall install such device forthwith on the appropriate line and shall furnish such investigative or law enforcement officer all additional information, facilities and technical assistance including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if such installation and assistance is directed by a court order as provided in section 18-6722(2)(b), Idaho Code. Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the officer of a law enforcement agency, designated in the court, at reasonable intervals during regular business hours for the duration of the order.

(3) A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for such reasonable expenses incurred in providing such facilities and assistance.

(4) No cause of action shall lie in any court against any provider of a wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order under this chapter.

(5) A good faith reliance on a court order, a legislative authorization, or a statutory authorization is a complete defense against any civil or criminal action brought under this chapter or any other law. [I.C., § 18-6723, as added by 1987, ch. 215, § 5, p. 460.]

18-6724. Reports concerning pen registers and trap and trace devices. [Repealed.]

Compiler's notes. Former § 18-6724, 1987, ch. 215, § 6, p. 460, was repealed by which comprised I.C., § 18-6724, as added by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

18-6725. Rule for prior interceptions. — Any pen register or trap and trace device installed prior to the effective date of this act which would

be valid and lawful without regard to the amendments made by sections 18-6719 and 18-6724, Idaho Code, shall be valid and lawful. [I.C., § 18-6725, as added by 1987, ch. 215, § 7, p. 460.]

Compiler's notes. Section 18-6724, referred to in this section, was repealed.

Section 8 of S.L. 1987, ch. 215 declared an emergency. Approved March 31, 1987.

CHAPTER 68

TELEGRAPH, TELEPHONE AND ELECTRIC LINES

SECTION.

- 18-6801. Removal or obstruction of telephone or telegraph lines or equipment.
- 18-6802. Electric lines — Punishment for injuring.
- 18-6803. Removal or destruction of electric transmission lines.
- 18-6804. Burning electric lines or plants.
- 18-6805. Punishment for removal, destruction or burning of electric lines or plants.

SECTION.

- 18-6806. Relinquishment of telephone line for emergency messages.
- 18-6807. Information required of person making request.
- 18-6808. Emergency calls enumerated.
- 18-6809. Misdemeanor to fail to relinquish or fraudulently procure use of line.
- 18-6810. Intentional destruction of a telecommunication line or telecommunication instrument.

18-6801. Removal or obstruction of telephone or telegraph lines or equipment. — Every person who maliciously displaces, removes, injures or destroys any public telephone instrument or any part thereof or any equipment or facilities associated therewith, or who enters or breaks into any coin box associated therewith, or who wilfully displaces, removes, injures or destroys any telegraph or telephone line, wire, cable, pole or conduit belonging to another or the material or property appurtenant thereto is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding three hundred dollars (\$300), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment. [I.C., § 18-6801, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7136; C.S., § 8521; I.C.A., § 17-4114; 1963, ch. 74, § 1, p. 268 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Collateral References. 29 C.J.S., Electricity, § 77.

18-6802. Electric lines — Punishment for injuring. — Any person who shall wilfully cut down or burn, or otherwise materially injure, any electric light pole, or shall shoot so as to materially injure any insulator, or knock said insulator loose from the pole to which it is attached, or otherwise materially injure such insulator, or who shall shoot any electric light wire, thereby breaking said wire, or who shall otherwise wilfully cut, break, or injure such wire, shall, upon conviction be guilty of a misdemeanor. [I.C., § 18-6802, as added by 1972, ch. 336, § 1, p. 844; am. 1991, ch. 45, § 1, p. 84.]

Compiler's notes. A former section, which comprised S.L. 1888-1889, p. 58, § 1; reen. R.C., & C.L., § 7143; C.S., § 8527; I.C.A., § 17-4115; 1963, ch. 74, § 2, p. 268 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

The portion of this section regarding wilful burning may be superseded by §§ 18-801 — 18-805 which seem to completely cover the subject of unlawful burnings.

Cross ref. Unauthorized connection with telegraph and telephone lines, § 18-6702.

18-6803. Removal or destruction of electric transmission lines. —

It shall be unlawful for anyone within the state of Idaho to take down, remove, injure, obstruct, displace or destroy, wilfully or maliciously and without the consent of the owner, any line erected or constructed for the transmission of electrical current, or any poles, wires, conduits, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure, or appurtenances thereto, or any machinery connected therewith or necessary to the use of any line erected or constructed for the transmission of electrical current:

Provided, nothing in this section shall be construed to prevent any person, after having given ten days' written notice, from removing or causing to be removed from his premises, or premises occupied by him, any of the above described line or lines, wires, conduits, cables, insulators or apparatus connected therewith; provided further, any such removals must be made by or under the direction of a skillful and competent electrician. [I.C., § 18-6803, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 341, § 1; reen. R.C., & C.L., § 7175; C.S., § 8576; I.C.A., § 17-4321 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Stealing electric current, § 18-4621 et seq.

Sec. to sec. ref. This section is referred to in § 18-6805.

18-6804. Burning electric lines or plants. — It shall be unlawful for any person within the state of Idaho to set fire, wilfully or maliciously, that shall result in the destruction or injury of any line erected or constructed for the transmission of electrical current, or any poles, conduits, cables, wires, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or any house, shop, building or other structure, or appurtenances thereto, or machinery connected therewith, or necessary to the use of, any line erected or constructed for the transmission of electrical current, or to set fire that shall in any manner interrupt the transmission of electrical current along such line. [I.C., § 18-6804, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 341, § 2; reen. R.C. & C.L., § 7176; C.S., § 8577; I.C.A., § 17-4322 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

This section may be superseded by §§ 18-

801 — 18-805, which were enacted in 1993 and seem to completely cover the subject of unlawful burnings.

18-6805. Punishment for removal, destruction or burning of electric lines or plants. — Any person or persons violating any provision or provisions of the two preceding sections or any part of said sections, shall, upon conviction thereof, be punished by a fine not exceeding \$500.00, or by imprisonment in the penitentiary not to exceed ten years, or by both such fine and imprisonment, in the discretion of the court. [I.C., § 18-6805, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 341, § 3; reen. R.C. & C.L., § 7177; C.S., § 8578; I.C.A., § 17-4323 was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6806. Relinquishment of telephone line for emergency messages. — Any person using a telephone line by which use restricts or denies use of such line by other persons shall relinquish the use of such line to any other person requesting the use of such line for emergency messages. [I.C., § 18-6806, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1957, ch. 104, § 1, p. 182 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6807. Information required of person making request. — Any person requesting that another person using a telephone line relinquish the use of such line for the purpose of an emergency message shall inform such person of the nature of the emergency, and their name and telephone number upon request. [I.C., § 18-6807, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1957, ch. 104, § 2, p. 182 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6808. Emergency calls enumerated. — Emergency telephone calls for the purpose of this act are calls for police, medical and fire aid. [I.C., § 18-6808, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. The words "this act" refer to §§ 18-6806 — 18-6809.

A former section, which comprised S.L. 1957, ch. 104, § 3, p. 182 was repealed by S.L.

1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6809. Misdemeanor to fail to relinquish or fraudulently procure use of line. — Any person using such line, failing or refusing to relinquish such line upon proper request, shall be guilty of a misdemeanor. Any person fraudulently procuring use of such line for nonexistent emergency shall be guilty of a misdemeanor. [I.C., § 18-6809, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1957, ch. 104, § 4, p. 182 was repealed by S.L. 1971, ch. 143, § 5, effective

January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-6810. Intentional destruction of a telecommunication line or telecommunication instrument. — (1) Any person who intentionally takes down, removes, injures or obstructs in any manner any telecommunication line or, any part thereof, or appurtenances or apparatus connected therewith, or severs any wire thereof or who intentionally takes, withholds, takes down, removes, injures or obstructs any telephone instrument or other instrument that is used or could be used to facilitate the transmission of messages, signals, facsimiles, video images or other communication by means of telephone, telegraph, cable, wire or the projection of energy or waves without physical connection (such as wireless or cellular), with the intent to prohibit, disrupt, inhibit, delay, disconnect or otherwise interfere with a person's ability to make contact with or otherwise communicate with an emergency service provider is guilty of a misdemeanor and shall be punished by a fine of up to one thousand dollars (\$1,000) or by imprisonment in the county jail for up to one (1) year, or both.

(2) For purposes of this statute, a "telecommunication line" shall be defined as any line used or that could be used for the transmission of any type of message or information, regardless of form or content.

(3) For purposes of this statute, an "emergency service provider" includes law enforcement, emergency medical service providers (including, but not limited to, ambulance, EMS, or paramedic service providers), fire suppression service providers, dispatch centers, dispatch personnel, and any person, entity, or security business (including private business) that has the authority to dispatch such service providers or that otherwise makes available the service of requesting a response, or providing notification of the need for a response, by any of the foregoing emergency service providers. The term "emergency service provider" shall also include any personnel, service or entity that can be contacted, either directly or indirectly, by dialing "911." [I.C., § 18-6810, as added by 2002, ch. 227, § 1, p. 654; am. 2003, ch. 247, § 1, p. 638.]

CHAPTER 69

OFFENSES INVOLVING MOTOR VEHICLES

SECTION.

18-6901 — 18-6917. [Repealed.]

18-6901 — 18-6917. Offenses involving motor vehicles. [Repealed.]

Compiler's notes. Sections 18-6901 — 18-6917 were enacted by S.L. 1981, ch. 223, § 3, effective July 1, 1982; however, § 3 of S.L.

1981, ch. 223 was repealed by S.L. 1982, ch. 353, § 3, effective April 2, 1982.

CHAPTER 70

TRESPASS AND MALICIOUS INJURIES TO PROPERTY

SECTION.

- 18-7001. Malicious injury to property.
- 18-7002. Construction of sections enumerating acts of malicious mischief.
- 18-7003. [Repealed.]
- 18-7004. Firing timber or prairie lands.
- 18-7005. Damage to forage on public lands from throwing away or leaving lighted substances.
- 18-7006. Trespass of privacy.
- 18-7007. [Repealed.]
- 18-7008. Trespass — Acts constituting.
- 18-7009. Destruction of timber on state lands.
- 18-7010. Cutting state timber for shipment.
- 18-7011. Criminal trespass — Definition and punishment.
- 18-7012. Opening gates and destroying fences.
- 18-7013. Reservoirs and tanks — Pollution when fenced or posted a misdemeanor.
- 18-7014. Injuries to crops.
- 18-7015. Trespass on inclosure for fur-bearing animals.
- 18-7016. Obliterating and defacing boundary monuments.
- 18-7017. Defacing natural scenic objects.
- 18-7018. Injuring jails.
- 18-7019. Injuring dams, canals, and other structures — Penalty.
- 18-7020. Destroying lumber, poles, rafts, and vessels.
- 18-7021. Injuring monuments, ornaments, and public improvements.
- 18-7022. Injuring gas or water pipes.
- 18-7023. Destroying mining and water right notices.

SECTION.

- 18-7024. Underground workings of mines — Setting fire to.
- 18-7025. Punishment for violation of preceding section.
- 18-7026. Sabotage.
- 18-7027. Desecration of grave, cemetery, headstone or place of burial prohibited.
- 18-7028. Unlawful removal of human remains — Malice — Intent to sell.
- 18-7029. Placing posters or promotional material on public or private property without permission.
- 18-7030. [Repealed.]
- 18-7031. Placing debris on public or private property a misdemeanor.
- 18-7032. Tampering with parking meters, coin telephones or vending machines — Possession of keys.
- 18-7033. Use of unauthorized vehicles on airports.
- 18-7034. Unlawful entry a misdemeanor.
- 18-7035. Damaging caves or caverns unlawful — Penalty.
- 18-7036. Injury by graffiti.
- 18-7037. Unauthorized release of certain animals, birds or aquatic species — Penalties.
- 18-7038. Destroying livestock.
- 18-7039. Killing and otherwise mistreating police dogs, police horses, search and rescue dogs and accelerant detection dogs.
- 18-7040. Interference with agricultural research.
- 18-7041. Damage to aquaculture operations.

18-7001. Malicious injury to property. — Every person who maliciously injures or destroys any real or personal property not his own, or any jointly owned property without permission of the joint owner, or any property belonging to the community of the person's marriage, in cases otherwise than such as are specified in this code, is guilty of a misdemeanor and shall be punishable by imprisonment in the county jail for up to one (1) year or a fine of not more than one thousand dollars (\$1,000), or both, unless the damages caused by a violation of this section exceed one thousand dollars (\$1,000) in value, in which case such person is guilty of a felony, and shall be punishable by imprisonment in the state prison for not less than one (1) year nor more than five (5) years, and may be fined not more than one thousand dollars (\$1,000), or by both such fine and imprisonment. [I.C., § 18-7001, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 186, § 1, p. 432; am. 1998, ch. 354, § 1, p. 1112.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 143; R.S., R.C., & C.L., § 7150; C.S., § 8539; I.C.A., § 17-4301 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Injuries to irrigation works, § 18-4301 et seq.

Killing and otherwise mistreating animals, § 25-3504.

Malicious injuries to railroads, highways, bridges, and telegraphs, §§ 18-6006 — 18-6011, 18-3910, 18-6801 — 18-6805, 18-4301 — 18-4310.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: *State v. Porath*, 113 Idaho 974, 751 P.2d 670 (Ct. App. 1988); *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988); *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988); *State v. McDonough*, 120 Idaho 650, 818 P.2d 354 (Ct. App. 1991); *State v. Marsh*, 122 Idaho 854, 840 P.2d 398 (Ct. App. 1992); *State v. Richmond*, 137 Idaho 35, 43 P.3d 794 (Ct. App. 2002).

ANALYSIS

Malice.

Relation to fixed term provision.

Sentence.

Value.

—Insufficient evidence.

Malice.

The definition of "malice" in subdivision (4) of § 18-101 leaves no room for an interpretation of the term to include negligence. *State v. Nastoff*, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

The use of "maliciously" to modify the verbs "injures or destroys," in this section, indicates that the act that must be performed with intent is the injuring or destroying of property; there is no implied legislative intent to create criminal liability under this section where the injury to property was an unintended consequence of conduct that may have violated some other statute. *State v. Nastoff*, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

When the state relies upon the "intent to do a wrongful act" form of malice in a prosecution under this section, the malice element is satisfied by evidence that defendant intended to injure the property of another, and the state is not required to prove that defendant intended the particular degree or scope of injury that ensued from his acts. *State v. Nunes*, 131 Idaho 408, 958 P.2d 34 (Ct. App. 1998).

Relation to Fixed Term Provision.

Where the evidence indicated that defendant and two others stole a pickup truck and tools and drove to a remote mining cabin which they vandalized, that they destroyed the pickup and stole some blasting materials with which they attempted to destroy some trees and that the total damage exceeded \$12,000, the sentencing court properly imposed a sentence of an indeterminate period not to exceed five years; even though the defendant was given the maximum number of years under this section, he was not given the maximum permissible sentence, because § 19-2513A (now repealed), when applied in conjunction with this section, would permit the sentencing court to impose a fixed term sentence of up to five years and, thus, the trial court did not abuse its discretion by failing to grant the defendant either probation, a 120-day rider or a lesser sentence. *State v. West*, 102 Idaho 562, 633 P.2d 1140 (1981).

Sentence.

Concurrent indeterminate sentences of two years for the driving under the influence, two years for the insufficient funds check and five years for the malicious injury to property was not an abuse of discretion where the defendant had an extensive criminal record when he committed the offenses, he suffered from severe alcoholism superimposed over a diagnosed aggressive personality disorder, creating a distinct potential for future violent behavior, and the presentence investigator concluded that he was a poor candidate for probation. *State v. Bolton*, 114 Idaho 269, 755 P.2d 1307 (Ct. App. 1988).

Defendant's unified sentence of 14 years with a minimum three-year term of incarceration for burglary, grand theft, and malicious injury to property was not excessive where defendant, after breaking into his employer's building and stealing a wrecker, led police on a dangerous, high-speed chase that ended only when he crashed the truck into a police blockade. *State v. Tucker*, 123 Idaho 374, 848 P.2d 432 (Ct. App. 1993).

Value.

Either the diminution of the object's fair market value or the reasonable cost of repair is a fair means of measuring damage when the offender has harmed but not destroyed the property. *State v. Hughes*, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997).

When the cost of repair is chosen as the valuation standard, the measure may not exceed the market value of the item. The defendant may challenge the cost of repair measure by presenting evidence of a lesser fair market value. *State v. Hughes*, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997).

Replacement cost evidence may be used as an indicator of value only when the State has

demonstrated that the fair market value of the destroyed item is not reasonably ascertainable or that the item has no market value. And when replacement cost is used, the State must show that the replacement, whether actually purchased by the victim or not, is a reasonably close proximation of the design and quality of the destroyed item. *State v. Hughes*, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997).

— **Insufficient Evidence.**

Where State made no effort to prove the

market value of the destroyed door or to show that its value was unascertainable, instead relying upon the price of the new door and ancillary equipment actually purchased by victim as a replacement, without evidence that the replacement was similar in quality or value to the destroyed door, evidence was insufficient that the property damage caused exceeded \$1,000. *State v. Hughes*, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997).

DECISIONS UNDER PRIOR LAW

Sentence.

A judge did not abuse his discretion in imposing a 15-year sentence with a minimum of six years confinement, or in later refusing to reduce the sentence for a defendant convicted of bombing a public structure where the judge explained the sentence in terms of protecting society, retribution and deterrence and also took rehabilitation into account. *State v. Langley*, 115 Idaho 727, 769 P.2d 604 (Ct. App. 1989).

Collateral References. 52 Am. Jur. 2d, Malicious Mischief, §§ 1 — 7.

54 C.J.S., Malicious, or Criminal Mischief or Damage to Property, §§ 1 — 11.

Vagrancy, trespassing as. 14 A.L.R. 1506.

Criminal offense of forcible detainer or trespass, where entry was peaceable. 49 A.L.R. 597.

Mineral resources supposed to exist, recovery for trespass which demonstrates lack of. 52 A.L.R. 104.

Air navigation over land of another as criminal trespass. 69 A.L.R. 318.

Right to protect grave of relative from desecration. 110 A.L.R. 384; 120 A.L.R. 655; 127 A.L.R. 1502; 141 A.L.R. 1030; 147 A.L.R. 698.

Criminal statute specifically denouncing offenses affecting cemeteries, tombstones, and the like. 132 A.L.R. 557.

18-7002. Construction of sections enumerating acts of malicious mischief. — The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section. [I.C., § 18-7002, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7151; C.S., § 8540; I.C.A., § 17-4302 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-7003. Burning property not subject to arson. [Repealed.]

Compiler's notes. Former § 18-7003, which comprised (I.C., § 18-7003, as added by 1972, ch. 336, § 1, p. 844), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

Another former section, which comprised

Cr. & P. 1864, § 57; R.S., § 7156; R.C., & C.L., § 7156; C.S., § 8556; I.C.A., § 17-4303 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-7004. Firing timber or prairie lands. — Any person who shall wilfully or carelessly set on fire, or cause to be set on fire, any timber or prairie lands in this state, thereby destroying the timber, grass or grain on any such lands, or any person who shall build a camp fire in any woods, or on any prairie, and leave the same without totally extinguishing such fire, or any railway company which shall permit any fire to spread from its right-of-way to the adjoining lands, is guilty of a misdemeanor. [I.C., § 18-7004, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Act Feb. 1887; R.S., R.C., & C.L., § 6921; C.S., § 8346; I.C.A., § 17-2722 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

The section may be superseded by §§ 18-801 — 18-805, which seem to completely cover the subject of unlawful burnings.

Cross ref. Civil action for waste and wilful trespass on real property, § 6-201 et seq.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: State v. Nastoff, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

ANALYSIS

Railroads.
Sentencing.

Railroads.

Railroad company unnecessarily leaving combustible material on its right-of-way was guilty of actionable negligence when fire spread from it to contiguous property. Curoe v. Spokane & I.E.R.R., 32 Idaho 643, 186 P. 1101, 37 A.L.R. 923 (1920).

18-7005. Damage to forage on public lands from throwing away or leaving lighted substances. — Any person who shall throw any lighted cigarette, cigar, match, ashes, or other flaming or glowing substance or any substance or thing which may cause a fire, from any vehicle, or who shall throw, deposit, or leave any lighted cigarette, cigar, match, ashes or other flaming or glowing substance or any substance or thing which may cause a fire in any place where the same may directly or indirectly cause a fire resulting in damage to forage on the lands of the United States or the state of Idaho or to the property of any person, is guilty of a misdemeanor and shall be punished accordingly. [I.C., § 18-7005, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1929, ch. 150, § 1, p. 274; I.C.A., § 17-2723 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Sentencing.

Where defendant was sentenced to a five-year unified sentence with two-years fixed and three-years indeterminate for burning property not subject to arson, and two one-year terms for firing timber or prairie lands, all to run concurrently, and during the period of retained jurisdiction, the judge decided to decrease the term of the fixed sentence to one year with four-years indeterminate because of defendant's performance in a special program, although the one-year sentence for firing of timber appeared to be illegal, because the sentence ran concurrently with the sentence for burning property not subject to arson, the issue of the illegal sentence was moot, and the other sentence was found to be reasonable in light of the potential danger to property and human life caused by the fire. State v. Goodson, 122 Idaho 553, 835 P.2d 1364 (Ct. App. 1992).

Collateral References. Liability for spread of fire intentionally set for legitimate purpose. 25 A.L.R.5th 391.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: State v. Nastoff, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

18-7006. Trespass of privacy. — It shall be unlawful for any person, upon the private property of another, to intentionally look, peer or peek in the door, window, or other transparent opening of any inhabited building or other structure located thereon, without visible or lawful purpose. Any person who violates the provisions of this section shall be guilty of a misdemeanor. [I.C., § 18-7006, as added by 1999, ch. 209, § 1, p. 558.]

Compiler's notes. Former § 18-7006, which comprised I.C., § 18-7006, as added by 1988, ch. 347, § 2, p. 1026, was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

Another former § 18-7006, which comprised I.C., § 18-7006, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1988, ch. 347, § 1.

Another third former § 18-7006, which comprised R.S., R.C., & C.L., § 7157; C.S., § 8557; I.C.A., § 17-4304 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-7007. Destruction of property by means of explosives — Degrees and penalties. [Repealed.]

Compiler's notes. Former § 18-7007, which comprised (I.C., § 18-7007, as added by 1988, ch. 347, § 3, p. 1026), was repealed by S.L. 1993, ch. 107, § 7, effective July 1, 1993.

A second former § 18-7007, which comprised I.C., § 18-7007, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1988, ch. 347, § 1.

A third former § 18-7007 which comprised S.L. 1905, p. 220, § 1; reen. R.C., & C.L., § 7174; C.S., § 8575; I.C.A., § 17-4305, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-7008. Trespass — Acts constituting. — A. Every person who willfully commits any trespass, by either:

1. Cutting down, destroying or injuring any kind of wood or timber belonging to another, standing or growing upon the lands of another; or
2. Carrying away any kind of wood or timber lying on such lands; or
3. Maliciously injuring or severing from the freehold of another, anything attached thereto, or the produce thereof; or
4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, stone; or
5. Digging, taking, or carrying away from any land in any of the cities of the state, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil or stone; or
6. Willfully opening, tearing down, or otherwise destroying any fence on the enclosed land of another, or opening any gate, bar, or fence of another and willfully leaving it open, or using the corral or corrals of another without the permission of the owner; or
7. Willfully covering up or encumbering in any manner, the land or city lot of another, without written permission from the owner or custodian thereof; or
8. Every person, except under landlord-tenant relationship, who, being first notified in writing, or verbally by the owner or authorized agent of the owner of real property, to immediately depart from the same and who refuses to so depart, or who, without permission or invitation, returns and enters said property within a year, after being so notified; or
9. Entering without permission of the owner or the owner's agent, upon the real property of another person which real property is posted with "No Trespassing" signs, is posted with a minimum of one hundred (100) square inches of fluorescent orange paint except that when metal fence posts are used, the entire post must be painted fluorescent orange, or other notices

of like meaning, spaced at intervals of not less than one (1) sign, paint area or notice per six hundred sixty (660) feet along such real property; provided that where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this section if said signs, paint or notices are posted at such points of access; or

10. Entering the property of another and, being unprovoked, intentionally and without the consent of the animal's owner, kills or injures a domestic animal not his own:

Is guilty of a misdemeanor.

B. Every person who while committing any trespass, intentionally and without consent of the animal's owner kills or injures a domestic animal of another, not including upland game birds or birds of any species not protected by law, shall be guilty of a misdemeanor. In addition to any other sentence of jail or a criminal fine imposed, a court may, for violation of this subsection or subsection A.10. of this section, impose a civil penalty in an amount up to double the value of the animal or for injuries sustained and payable to the owner of the animal. [I.C., § 18-7008, as added by 1972, ch. 336, § 1, p. 844; am. 1976, ch. 154, § 1, p. 550; am. 1992, ch. 283, § 1, p. 874; am. 1999, ch. 106, § 1, p. 333; am. 2000, ch. 147, § 1, p. 375.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 144; S.L. 1871, p. 21, § 154; R.S., & R.C., § 7158; 1911, ch. 145, p. 449; reen. C.L., § 7158; C.S., § 8558; 1931, ch. 175, § 1, p. 289; I.C.A., § 17-4306; 1963, ch. 309, § 1, p. 816 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 2 of S.L. 1976, ch. 154 is compiled herein as § 18-7011.

Section 2 of S.L. 1992, ch. 283 is compiled as § 36-1603.

Cross ref. Forcible entry and detainer, § 18-3502.

Penalty for misdemeanor when not otherwise provided, § 18-113.

Waste, civil action for, § 6-201.

Sec. to sec. ref. This section is referred to in § 18-7011.

Cited in: State v. Kelly, 106 Idaho 268, 678 P.2d 60 (Ct. App. 1984); Hughes v. Union Pac. R.R., 114 Idaho 466, 757 P.2d 1185 (1988); State v. Barton, 119 Idaho 114, 803 P.2d 1020 (Ct. App. 1991).

ANALYSIS

Constitutionality.

Defense of premises.

Defenses.

Evidence.

—Inference by jury.

Mental trespass.

Persons liable.

Reason for requested departure not required.

Retrial.

Tearing down fence.

Constitutionality.

There is no ambiguity in Idaho Code § 18-7008(A)(8), whose terms are to be given their commonly understood, everyday meanings, and the statute (1) makes no distinction between private and public property, (2) informs the public of the prohibited conduct and thus gives fair notice of the conduct that is made criminal by the statute, and (3) does not allow for unbridled discretion in police enforcement; thus, the statute is not unconstitutional under the void for vagueness doctrine. State v. Korsen, 138 Idaho 706, 69 P.3d 126 (2003).

Reasonable reading of Idaho Code § 18-7008(A)(8) shows that the statute does not reach a substantial amount of constitutionally protected conduct, and thus the statute is not overbroad; the trial court erred in analyzing the issue by combining the "facial" and "as applied" analysis, and the trial court committed reversible error in determining that the statutory language was overbroad. State v. Korsen, 138 Idaho 706, 69 P.3d 126 (2003).

Defense of Premises.

When trespasser refuses to leave premises after being asked to depart, or defiantly stands his ground armed with a deadly weapon, rightful occupant may at once resort to a reasonable degree of force to remove him. Tipword v. Potter, 31 Idaho 509, 174 P. 133, 6 A.L.R. 527 (1918).

Defenses.

Trespass conviction was upheld where defendant who rode his horse through a private

development could not prove he possessed an easement and/or license to use the property upon which he trespassed. *State v. Camp*, 134 Idaho 662, 8 P.3d 657 (Ct. App. 2000).

Evidence.

Where it was clear from the evidence that the rice harvested by defendants belonged to the state of Idaho and was growing in an area managed by the Fish and Game Department, that one of the defendants was a former employee of the department, with knowledge that the rice was raised as cover, habitat and feed for migratory waterfowl and that the defendants did not have express permission from any entity to harvest the rice, there was substantial, competent evidence to support the jury's verdicts finding defendants guilty of criminal trespass. *State v. Gissel*, 105 Idaho 287, 668 P.2d 1018 (Ct. App. 1983).

—Inference by Jury.

Where it reasonably could be inferred from the evidence that the defendants knew they were committing a wrongful act i.e., taking, without permission, property belonging to someone other than themselves, the drawing of such an inference properly would be within the province of the jury, not the court, in deciding whether, as a matter of fact, the conduct of the defendants was "malicious" under the trespass statutes and, by rendering verdicts of guilty, in light of the inferences which could be drawn from the evidence, the jury could, and did, find the element of malice was proven. *State v. Gissel*, 105 Idaho 287, 668 P.2d 1018 (Ct. App. 1983).

Mental Trespass.

There is no such thing as mental trespass. *Idaho Power Co. v. Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941).

Persons Liable.

Any person who is present at commission of trespass, encouraging or inciting same, is

liable as principal. *Duck Lee v. Boise Dev. Co.*, 21 Idaho 461, 122 P. 851 (1912).

Reason for Requested Departure Not Required.

Because a property owner is not required to have any reason for asking the trespasser to depart the owner's land, under subsection (A)(8) a prosecutor's question as to why property owner asked defendant to get off his land was irrelevant. *State v. Missamore*, 119 Idaho 27, 803 P.2d 528 (1990).

Retrial.

Magistrate erred in granting defendant's motion for acquittal under Idaho Crim. R. 29 because the magistrate improperly found that the state official who requested defendant to leave the premises failed to express an adequate reason for doing so, and such was not an element in the trespass statute; because the magistrate's dismissal was based on an erroneous legal conclusion, double jeopardy principles under Const., Art. I, § 13 did not bar a retrial of defendant on the trespass charge. *State v. Korsen*, 138 Idaho 706, 69 P.3d 126 (2003).

Tearing Down Fence.

Defense of good faith, in tearing down a fence based on the belief that the fence was on his own land was for the jury where there was substantial evidence that accused purposely tore down fencing on land claimed and occupied by another. *State v. Jacobson*, 55 Idaho 711, 47 P.2d 228 (1935).

Collateral References. Right to enter land to remove timber cut before revocation of license. 26 A.L.R.2d 1194.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 A.L.R.3d 551.

18-7009. Destruction of timber on state lands. — Every person who wilfully and without authority enters upon the public lands of the state and cuts down, destroys or injures any kind of wood or timber, standing or growing upon such lands, or who wilfully and without authority carries away any kind of wood or timber lying on such lands, is guilty of a misdemeanor. [I.C., § 18-7009, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1893, p. 139, § 26; reen. S.L. 1899, p. 73, § 28; reen. R.C. & C.L., § 6987; C.S., § 8389; I.C.A., § 17-3213 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

For provisions compiled elsewhere in this code relating to state lands, see the heading "state lands" in the Table of Penal Provisions In Other Volumes located at the end of this volume.

Collateral References. Revocation of li-

cense to cut and remove timber as affecting rights in respect of timber but not removed. 26 A.L.R.2d 1194.

Venue of action for the cutting, destruction, or damage of standing timber or trees. 65 A.L.R.2d 1268.

18-7010. Cutting state timber for shipment. — Every person who wilfully and without authority enters upon the public lands of the state and cuts down, destroys or injures any kind of wood or timber growing upon such lands, for the purpose of shipping, freighting, floating or otherwise transporting such wood or timber out of the state, or who shall ship, freight or float, or otherwise transport out of the state, any wood or timber cut upon the public lands of the state, shall be guilty of a felony. [I.C., § 18-7010, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1893, p. 139, § 27; reen. S.L. 1899, p. 72, § 29; reen. R.C. & C.L., § 6988; C.S., § 8390; I.C.A., § 17-3214 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for felony when not otherwise provided, § 18-112.

Collateral References. Validity, construction, and application of statutes or ordinances penalizing one who enters or remains in dwelling after having been forbidden to do so. 146 A.L.R. 655.

18-7011. Criminal trespass — Definition and punishment. —
1. Any person who, without consent of the owner or person in charge of any lands which are inclosed by fences of any description sufficient to show the boundaries of the land inclosed, shall go upon such lands and shall leave open any gates on or about said premises, or who shall tear down or lay down any fencing, or who shall wilfully remove, mutilate, damage or destroy any "No Trespassing" signs or markers, or who shall go through cultivated crops that have not been harvested, or who shall damage any property thereon, or who without permission of the owner or the owner's agent enters the real property of another person where such real property is posted with "No Trespassing" signs or other notices of like meaning spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property, is guilty of a misdemeanor and on conviction thereof shall be punished by imprisonment in a county jail not exceeding six (6) months or by a fine of not less than twenty-five dollars (\$25.00) and not more than three hundred dollars (\$300) or by both such fine and imprisonment. Where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this section if said signs or notices are posted at such points of access.

As used in this subsection and in section 18-7008, Idaho Code: "enters," "entry" and "entering" mean going upon or over real property either in person or by causing any object, substance or force to go upon or over real property.

2. No motor vehicle shall be wilfully or intentionally driven into, upon, over or through any private land actively devoted to cultivated crops without the consent of the owner of the land or the tenant, lessee or agent of the owner of the land actively devoted to cultivated crops. Violation of the provisions of this section shall be a misdemeanor. For the purpose of this

subsection, motor vehicle shall be defined as set forth in sections 49-114 and 49-123, Idaho Code. Land actively devoted to cultivated crops shall be defined as land that is used to produce field crops including, but not limited to, grains, feed crops, legumes, fruits and vegetables. [I.C., § 18-7011, as added by 1972, ch. 336, § 1, p. 844; am. 1976, ch. 154, § 2, p. 550; am. 1984, ch. 37, § 1, p. 63; am. 1984, ch. 55, § 2, p. 94; am. 1988, ch. 265, § 561, p. 549.]

Compiler's notes. A former section, which comprised S.L. 1927, ch. 161, § 1, p. 216; I.C.A., § 17-4307 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 1 of S.L. 1976, ch. 154 is compiled herein as § 18-7008.

Sections 560 and 562 of S.L. 1988, ch. 265 are compiled as §§ 8-506A and 18-7803.

Section 3 of S.L. 1976, ch. 154 declared an emergency. Approved March 17, 1976.

Section 586 of S.L. 1988, ch. 265 provided that the act should take effect on and after January 1, 1989.

18-7012. Opening gates and destroying fences. — It shall be a misdemeanor for any person to open and leave open any gate not belonging to such person or rightfully under his control, or to cut, break, tear down, or otherwise injure, any fence or wall or any obstruction used for a fence not belonging to such person or rightfully under his control. [I.C., § 18-7012, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1903, p. 427, § 1; reen. R.C., & C.L., § 7142; C.S., § 8526; I.C.A., § 17-4113 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7013. Reservoirs and tanks — Pollution when fenced or posted a misdemeanor. — Whenever any individual, individuals or corporation, municipal, public or private, owning, operating or maintaining any reservoir, pond, tank or any structure or place wherein or whereon water is stored, either in whole or in part for domestic use, has the area or ground on or wherein such reservoir, pond, tank, structure or place is located, wholly inclosed by any fence or artificial barrier, and has posted or caused to be posted, warning signs in conspicuous places on such fence or artificial barrier forbidding entry, it shall be unlawful for any person to enter, or to throw or place, or to cause to be thrown or placed, any substance or thing whatsoever, within the area so inclosed by such fence or artificial barrier, without the consent of such individual, individuals or corporation, and any violation hereof shall constitute a misdemeanor and shall be punishable accordingly. [I.C., § 18-7013, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1941, ch. 29, § 1, p. 53 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section

added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7014. Injuries to crops. — Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this code, is guilty of a misdemeanor. [I.C., § 18-7014, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7159; C.S., § 8559; I.C.A., § 17-4308 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7015. Trespass on inclosure for fur-bearing animals. — When the owner of any inclosure wherein foxes or other fur-bearing animals are held in captivity, shall erect a fence or other barrier around the same and within the boundaries of the premises under the exclusive dominion and control of such owner, and shall post warning signs in conspicuous places along such fence or barrier prohibiting trespass on the clear space between such fence or barrier and the inclosure aforesaid, it shall be unlawful for any person, without the permission of such owner, to cross such fence or barrier or trespass upon such clear space.

Any person violating the provisions hereof shall be deemed guilty of a misdemeanor. [I.C., § 18-7015, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised C.S., § 8559A, as added by S.L. 1929, ch. 105, § 1, p. 171; I.C.A., § 17-4309 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7016. Obliterating and defacing boundary monuments. — Every person who either:

1. Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land; or
2. Maliciously defaces or alters the marks upon any such monument; or
3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks;

Is guilty of a misdemeanor. [I.C., § 18-7016, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 73; R.S., R.C., & C.L., § 7160; C.S., § 8560; I.C.A., § 17-4310 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7017. Defacing natural scenic objects. — It shall be unlawful for any person to paint, sketch, or place in any manner or form or by any means, upon any rock or rocks or similar natural object or objects, any place within the state of Idaho, any sign, advertisement or picture or commercial or business name, for business or commercial purposes. Any person who

violates the provisions of this section shall be deemed guilty of a misdemeanor. [I.C., § 18-7017, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1911, ch. 132, p. 419; reen. C.L., § 7160a; C.S., § 8561; I.C.A., § 17-4311 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 40-1910.

18-7018. Injuring jails. — Every person who wilfully and intentionally breaks down, pulls down or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding \$10,000, and by imprisonment in the state prison not exceeding five years. [I.C., § 18-7018, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 147; R.S., R.C., & C.L., § 7161; C.S., § 8562; I.C.A., § 17-4312 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

ANALYSIS

Equal protection.
Evidence.

Equal Protection.

Defendant, convicted for injury to a public jail, was not denied equal protection of the laws where prosecutor alleged violation of

this section (a felony) rather than a violation of I.C. § 18-7001 (a misdemeanor) since the felony-misdemeanor classification challenged was reasonably related to the gravity of injury to property and injury to public jails. *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

Evidence.

Fact that defendants escaped through hole made in a prison, and were the only prisoners who did so, should receive same weight as an incriminating circumstance as the fact of possession of stolen property receives in larceny prosecutions. *State v. Yancey*, 47 Idaho 1, 272 P. 495 (1928).

18-7019. Injuring dams, canals, and other structures — Penalty. — Every person who wilfully and maliciously cuts, breaks, injures or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed or marsh land, or to conduct water for mining, manufacturing, reclamation or agricultural purposes, or any embankment necessary to the same, or either of them; or wilfully or maliciously makes, or causes to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee or structure, with intent to injure or destroy the same, is punishable by a fine not exceeding \$1,000, or by imprisonment in the state prison not exceeding two years, or by both. [I.C., § 18-7019, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 146; R.S., R.C., & C.L., § 7162; C.S., § 8563; I.C.A., § 17-4313 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

ish both those who succeed in wilfully and maliciously inflicting serious damage to a structure and those who intend to inflict serious damage but wilfully and maliciously create damage less immediate in nature. *State v. Suiter*, 138 Idaho 662, 67 P.3d 1274 (Ct. App. 2003).

Purpose.

Idaho Code § 18-7019 was created to pun-

18-7020. Destroying lumber, poles, rafts, and vessels. — Every person who wilfully and maliciously burns, injures, marks, brands or defaces or destroys any pile, piling, telegraph pole, telephone pole or electric transmission line pole, fence post, pile or raft of wood, plank, boards or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or part thereof, or cuts, breaks, injures, sinks or sets adrift any vessel the property of another, is punishable by a fine not exceeding \$300.00, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [I.C., § 18-7020, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 145; R.S., & C.L., § 7163; S.L. 1909, p. 26, H.B. 41; reen. C.L., § 7163; C.S., § 8564; I.C.A., § 17-4314 was

repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-7021. Injuring monuments, ornaments, and public improvements. — Every person, not the owner thereof, who wilfully mars, disfigures, breaks or otherwise injures, or molests, removes or destroys, any work of art, monument, landmark, historic structure, shade tree, shrub, ornamental plant, or useful or ornamental improvement, is guilty of a misdemeanor. [I.C., § 18-7021, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised Cr. & P. 1864, § 144; R.S., R.C., & C.L., § 7170; C.S., § 8571; S.L. 1929, ch. 61, § 1, p. 88; I.C.A., § 17-4318 was repealed by S.L. 1971, ch. 143, § 5, effective January 1,

1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7022. Injuring gas or water pipes. — Every person who wilfully breaks, digs up, obstructs or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water or any appurtenances or appendages therewith connected, is guilty of a misdemeanor. [I.C., § 18-7022, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7171; C.S., § 8572; I.C.A., § 17-4319 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7023. Destroying mining and water right notices. — Every person who intentionally defaces, obliterates, tears down or destroys any notice posted on any lode or placer mining claim, or ditch, or water right, or location, or who removes, takes down or destroys any post or monument erected or placed to mark or indicate any such claim, right or location, or any part or boundary thereof, or part thereon, is guilty of a misdemeanor. [I.C., § 18-7023, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7172; C.S., § 8573; I.C.A., § 17-4320 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L.

1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

18-7024. Underground workings of mines — Setting fire to. — It shall be unlawful for any person or persons to set fire, wilfully or maliciously, in or within any of the underground tunnels, shafts, or any of the underground workings of any mine in the state of Idaho that shall result in the burning of, destruction of, or injury to any of the timbering or workings of any such mine or any part thereof. [I.C., § 18-7024, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1923, ch. 189, § 1, p. 296; I.C.A., § 17-4324 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch.

336, § 1 in the same words as the section prior to its repeal.

This section may be superseded by §§ 18-801 — 18-805, which seem to completely cover the subject of unlawful burnings.

18-7025. Punishment for violation of preceding section. — Any person or persons violating any of the provisions of this act shall be guilty of a felony and upon conviction thereof shall be punished by not less than five (5) nor more than twenty (20) years imprisonment in the state penitentiary. [I.C., § 18-7025, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1923, ch. 189, § 2, p. 296; I.C.A., § 17-4325 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and

the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-7026. Sabotage. — Any person who wilfully, maliciously or mischievously drives or causes to be driven or imbedded any nail, spike or piece of iron, steel or other metallic substance, or any rock or stone, into any log or timber intended to be manufactured into boards, lath, shingles or other lumber, or to be marketed for such purpose, is punishable by imprisonment in the state prison not more than five (5) years or by imprisonment in the county jail not less than six (6) months, or by fine not to exceed \$5000, in the discretion of the court. [I.C., § 18-7026, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised R.C., § 7178, enacted by 1917, ch. 136, p. 446, reen. C.L., § 7178; C.S., § 8579; I.C.A., § 17-4326 was repealed by S.L. 1971,

ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

18-7027. Desecration of grave, cemetery, headstone or place of burial prohibited. — It shall be unlawful for any person, not acting in full compliance with all the terms of the law to desecrate or molest in any way any portion of any grave, cemetery, headstone, grave marker, mausoleum, crypt, or other place of burial, whether of whole bodies or ashes, or other evidence of remains of a deceased human body. Any person convicted or found guilty of violating the provisions of this section is guilty of a misdemeanor. [I.C., § 18-7027, as added by 1984, ch. 73, § 2, p. 135.]

Compiler's notes. Former § 18-7027, which comprised I.C., § 18-7027, as added by 1972, ch. 336, § 1, p. 844, was repealed by

S.L. 1984, ch. 73, § 1, effective March 22, 1984.

Cross ref. Protection of graves, §§ 27-501 — 27-504. application of grave robbing statutes. 52 A.L.R.3d 701.

Collateral References. Construction and

18-7028. Unlawful removal of human remains — Malice — Intent to sell. — Every person who removes any part of any human remains from any place where it has been interred, or from any place where it is deposited while awaiting interment, with intent to sell it or to dissect it, without authority of law, or from malice or wantonness is guilty of a felony punishable by imprisonment in the state penitentiary for not more than five (5) years, by a fine not greater than ten thousand dollars (\$10,000) or by both such fine and imprisonment. [I.C., § 18-7028, as added by 1984, ch. 73, § 3, p. 135.]

Compiler's notes. Former § 18-7028, which comprised I.C., § 18-7028, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1984, ch. 73, § 1, effective March 22, 1984.

Section 4 of S.L. 1984, ch. 73 is compiled as §§ 27-501 — 27-504.

Section 5 of S.L. 1984, ch. 73 declared an emergency. Approved March 22, 1984.

18-7029. Placing posters or promotional material on public or private property without permission. — It shall be unlawful for any person to erect, install, attach or paint, or cause to be erected, installed, attached or painted, election posters or signs upon public or private property, real or personal, in the state of Idaho, without permission from the owner or occupant of such property, and it shall be unlawful for any person to place or leave any literature or other political, promotional or sales materials upon public or private property, real or personal, in the state of Idaho when the owner or occupant of such property, by a sign conspicuously posted on the property, or by other written or audio communication to such person, has forbidden the placing or leaving of literature or other political, promotional or sales material upon that property. Provided, however, that the granting of such permission by any public utility company on behalf of any candidate for public office shall constitute the granting of like permission by such public utility company to all other candidates for the same public office. Any violation of this section shall be a misdemeanor. [I.C., § 18-7029, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 167, § 8, p. 374.]

Compiler's notes. A former section, which comprised S.L. 1961, ch. 196, § 1, p. 303 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section

added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 7 of S.L. 1994, ch. 167 is compiled as § 18-6718.

18-7030. Violation of preceding section a misdemeanor. [Repealed.]

Compiler's notes. Former § 18-7030, which comprised I.C., § 18-7030, as added by 1972, ch. 336, § 1, p. 844, was repealed by S.L. 1994, ch. 167, § 1, effective July 1, 1994.

Another former § 18-7030, which comprised S.L. 1961, ch. 196, § 2, p. 303 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

18-7031. Placing debris on public or private property a misdemeanor. — It shall constitute a misdemeanor for any person, natural or artificial, to deposit upon any public or private property within this state any debris, paper, litter, glass bottles, glass, nails, tacks, hooks, cans, barbed wire, boards, trash, garbage, lighted material or other waste substances on any place not authorized by any county, city, village or the owner of such property, and is punishable by imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding three hundred dollars (\$300), or both. Additionally, a peace officer or state fish and game personnel supervised public service of not less than eight (8) hours and not more than forty (40) hours may be imposed to clean up and to properly dispose of debris from public property, or from private property with the written consent of the private property owner, as ordered by the court. [I.C., § 18-7031, as added by 1972, ch. 336, § 1, p. 844; am. 1994, ch. 119, § 1, p. 269.]

Compiler's notes. A former section, which comprised S.L. 1963, ch. 220, § 1, p. 629 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the same

words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor not otherwise provided, § 18-113.

Sec. to sec. ref. This section is referred to in § 36-1301.

18-7032. Tampering with parking meters, coin telephones or vending machines — Possession of keys. — Any person who without lawful authority, wilfully and wrongfully, opens, removes or damages any parking meter, coin telephone or other vending machine dispensing goods or services, or a part thereof; or possesses a key or device specifically designed to open or break any parking meter, coin telephone or other vending machine dispensing goods or services; or possesses a drawing, print or mold of a key or device specifically designed to open or break any parking meter, coin telephone or other vending machine dispensing goods or services, shall be guilty of a misdemeanor. [I.C., § 18-7032, as added by 1972, ch. 381, § 15, p. 1102.]

Compiler's notes. A former section, which comprised S.L. 1971, ch. 74, § 1, p. 169 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 381, § 15 in the same words as the section prior to its repeal.

Sections 14 and 16 of S.L. 1972, ch. 381, are compiled as §§ 18-6409 and 19-2601, respectively.

Cross ref. Punishment for misdemeanor when not provided, § 18-113.

Collateral References. Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine. 45 A.L.R.3d 1286.

18-7033. Use of unauthorized vehicles on airports. — It shall be a misdemeanor offense for any unauthorized vehicle to drive upon, cross or traverse any public or public use airport without the consent of the owner or his designated representative. The owner, operator or lessee or any of them guilty of operating a vehicle upon airport landing surfaces shall be liable for damage caused to the airport surfaces and for any injuries or damages to persons or property resulting from such damage. The operator, owner or lessee of an unauthorized vehicle involved in a collision with an aircraft while operating upon a public or public use airport shall be held liable for

damages to persons or property, both the owner and lessee shall be thus liable, and may be sued jointly, or either or both of them may be sued separately. [I.C., § 18-7033, as added by 1974, ch. 81, § 1, p. 1171.]

Compiler's notes. Section 2 of S.L. 1974, ch. 81 declared an emergency. Approved March 21, 1974. **Cross ref.** Penalty for misdemeanor when not specified, § 18-113.

18-7034. Unlawful entry a misdemeanor. — Every person, except under landlord-tenant relationship, who enters any dwelling house, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, closed vehicle, closed trailer, airplane, railroad car or outbuilding without the consent of the owner of such property or his agent or any person in lawful possession thereof, is guilty of a misdemeanor. [I.C., § 18-7034, as added by 1981, ch. 322, § 1, p. 671; am. 1994, ch. 216, § 1, p. 673.]

18-7035. Damaging caves or caverns unlawful — Penalty. — It shall be unlawful for any person, without prior permission of the federal, state or private landowner, to willfully or knowingly break, break off, crack, carve upon, write or otherwise mark upon, or in any manner destroy, mutilate [mutilate], injure, deface, remove, displace, mar or harm any natural material found in any cave or cavern, such as stalactites, stalagmites, helictites, anthodites, gypsum flowers or needles, flowstone, draperies, columns, tufa dams, clay or mud formations or concretions, or other similar crystalline mineral formations or otherwise; to kill, harm or in any manner or degree disturb any plant or animal life found therein; to otherwise disturb or alter the natural conditions of such cave or cavern through the disposal therein of any solid or liquid materials such as refuse, food, containers or fuel of any nature, whether or not malice is intended; to disturb, excavate, remove, displace, mar or harm any archaeological artifacts found within a cave or cavern including petroglyphs, projectile points, human remains, rock or wood carvings or otherwise, pottery, basketry or any handwoven articles of any nature, or any pieces, fragments or parts of any such articles; or to break, force, tamper with, remove of [or] otherwise disturb a lock, gate, door, or other structure or obstruction designed to prevent entrance to a cave or cavern, without the permission of the owner thereof, whether or not entrance is gained. For purposes of this section, "cave" means any natural geologically formed void or cavity beneath the surface of the earth, not including any mine, tunnel, aqueduct or other manmade excavation, which is large enough to permit a person to enter. Any person violating the provisions of this section shall be guilty of a misdemeanor. [I.C., § 18-7035, as added by 1982, ch. 283, § 1, p. 717.]

Compiler's notes. The bracketed words "mutilate" and "or" in the first sentence were inserted by the compiler.

18-7036. Injury by graffiti. — No person shall purposely or knowingly vandalize, deface or otherwise damage the property of another by painting,

writing, drawing, or otherwise inscribing thereon in any fashion that which is commonly known as graffiti. Graffiti includes any form of painting, writing, or inscription regardless of the content or the nature of the materials used which is applied to any public or private surface without the consent of the owner of the property. Every person who is convicted of a violation of the provisions of this section is guilty of a misdemeanor. [I.C., § 18-7036, as added by 1987, ch. 274, § 1, p. 567.]

18-7037. Unauthorized release of certain animals, birds or aquatic species — Penalties. — (1) Any person who without expressed permission from the owner or agent releases an animal, a bird, or an aquatic species which has been lawfully confined for agriculture, science, research, commerce, public propagation, protective custody, or education is liable: (a) to the owner or agent exercising possession of the animal, bird or aquatic species for damages and replacement costs, including the costs of restoring the animal, bird, or aquatic species to confinement and to its health condition prior to release; and (b) for damage to personal and real property caused by the release of the animal, bird or aquatic species. If the release causes the failure of an experiment, the person is liable for all costs of repeating the experiment, including replacement of the animal, bird or aquatic species.

(2) Any person who intentionally and without permission releases an animal, a bird, or an aquatic species which has been lawfully confined for agriculture, science, research, commerce, public propagation, protective custody, or education is guilty of a misdemeanor. [I.C., § 18-7037, as added by 1990, ch. 38, § 1, p. 58.]

Compiler's notes. Both S.L. 1990, ch. 38, § 1, approved March 7, 1990, effective July 1, 1990 and S.L. 1990, ch. 126, § 1, approved March 23, 1990, effective July 1, 1990, purported to enact a new section of chapter 70, title 18 of the Idaho Code, designated as

§ 18-7037. Since § 18-7037 as enacted by ch. 38, § 1 was approved first it was compiled as § 18-7037 and the § 18-7037 as enacted by ch. 126, § 1 was compiled as § [18-7038] 18-7037 and was subsequently amended and redesignated as § 18-7038.

18-7038. Destroying livestock. — (1) Any person who shall, without the permission of the owner:

(a) Wilfully and intentionally destroy; or

(b) Destroy and remove the body or any body parts of any livestock with a value as set forth in subsection (1)(b) of section 18-2407, Idaho Code, shall be guilty of a felony.

(2) If the value of the livestock is less than that set forth in subsection (1)(b) of section 18-2407, Idaho Code, a violation of the provisions of this section shall be a misdemeanor.

(3) The provisions of this section shall not apply to any peace officer, veterinarian or officially designated animal control officer who, in the discharge of his official duties is called upon the scene of injured livestock and cannot contact the owner or caretaker of the injured animal within thirty (30) minutes, and he reasonably determines that the injured animal is suffering to such a degree that humane destruction is warranted, and he humanely destroys or causes the animal to be humanely destroyed. [I.C.,

§ [18-7038] 18-7037, as added by 1990, ch. 126, § 1, p. 297; am. and redesign. 1991, ch. 102, § 1, p. 229.]

Compiler's notes. Both S.L. 1990, ch. 38, § 1, approved March 7, 1990, effective July 1, 1990 and S.L. 1990, ch. 126, § 1, approved March 23, 1990, effective July 1, 1990, purported to enact a new section of chapter 70, title 18 of the Idaho Code, designated as § 18-7037. Since § 18-7037 as enacted by ch. 38, § 1 was approved first it was compiled as § 18-7037 and the § 18-7037 as enacted by

ch. 126, § 1 was compiled as § [18-7038] 18-7037 and was subsequently amended and redesignated as § 18-7038 [this section] by S. L. 1991, ch. 101, § 1.

This section was formerly compiled as § [18-7038] 18-7037.

Section 2 of S.L. 1990, ch. 126 repealed § 25-1904 and § 3 is compiled as § 25-1910.

18-7039. Killing and otherwise mistreating police dogs, police horses, search and rescue dogs and accelerant detection dogs. —

(1) Definitions:

(a) "Police dog" shall include:

- (i) "Bomb detection dog" means a dog trained to locate bombs or explosives by scent;
- (ii) "Narcotic detection dog" means a dog trained to locate narcotics by scent;
- (iii) "Patrol dog" means a dog trained to protect a peace officer and to apprehend a person;
- (iv) "Tracking dog" means a dog trained to track and find a missing person, escaped inmate or fleeing felon.

(b) "Police horse" means any horse which is owned, or the service of which is employed, by a law enforcement agency for the principal purpose of aiding in detection of criminal activity, enforcement of laws and apprehension of offenders.

(c) "Search and rescue dog" means a dog which is trained to locate lost or missing persons, victims of natural or man-made disasters, and human bodies.

(d) "Accelerant detection dog" means a dog which is used exclusively for accelerant detection, commonly referred to as arson canines.

(2) The provisions of this section shall apply to police dogs and police horses used by peace officers, including any used by a corrections officer in the performance of the officer's duties, and to search and rescue dogs and accelerant detection dogs used by peace officers or certified handlers under the supervision of a peace officer. The provisions of this section shall apply when the animals are on duty and when not on duty.

(3) Any person who willfully and maliciously and with no legal justification, and with intent to inflict such injury or death, personally causes the death, destruction, or serious physical injury including bone fracture, loss or impairment of function of any bodily organ, wounds requiring extensive suturing, or serious crippling, of any police dog, police horse, search and rescue dog or accelerant detection dog, shall be guilty of a felony under this section and shall be punished by imprisonment in the state penitentiary for a period not to exceed five (5) years, or by a fine not to exceed ten thousand dollars (\$10,000), or by both such fine and imprisonment.

(4) Any person who willfully, maliciously and with no legal justification,

throws, hurls or projects at a police dog, police horse or search and rescue dog, any rock, object or other substance which is used in such a manner as to be capable of producing injury and likely to produce injury or kicks, strikes, beats, or torments any police dog, police horse or search and rescue dog is guilty of a misdemeanor and shall be punished by imprisonment for not more than one (1) year or by a fine not exceeding one thousand dollars (\$1,000), or by both such fine and imprisonment.

(5) Any person who willfully and maliciously and with no legal justification, interferes with or obstructs any police dog, police horse or search and rescue dog being used by any peace officer in the discharge of the officer's duties by teasing, agitating, harassing such animals, or who causes another person or persons, animal or animals, to do likewise, is guilty of a misdemeanor and shall be punished by imprisonment for not more than one (1) year or by a fine not exceeding one thousand dollars (\$1,000), or by both such fine and imprisonment.

(6) In any case in which a defendant is convicted of a violation of the provisions of this section, the defendant shall be ordered to make restitution to the agency owning the animal and employing the peace officer for any veterinary bills, replacement costs of the animal if it is disabled or killed, and the salary of the peace officer for the period of time his or her services are lost to the agency.

(7) The provisions of this subsection do not apply to peace officers or veterinarians who terminate the life of such a police dog, police horse or search and rescue dog for the purpose of relieving the police dog, police horse or search and rescue dog of undue pain or suffering. [I.C., § 18-7039, as added by 1994, ch. 157, § 1, p. 356.]

18-7040. Interference with agricultural research. — (1) A person commits the crime of interference with agricultural research if the person knowingly:

- (a) Damages any property at an agricultural research facility with the intent to damage or hinder agricultural research or experimentation;
- (b) Obtains any property of an agricultural research facility with the intent to damage or hinder agricultural research or experimentation;
- (c) Obtains access to an agricultural research facility by misrepresentation with the intent to perform acts that would damage or hinder agricultural research or experimentation;
- (d) Enter an agricultural research facility with the intent to damage, alter, duplicate or obtain unauthorized possession of records, data, materials, equipment or specimens related to agricultural research or experimentation;
- (e) Without the authorization of the agricultural research facility, obtains or exercises control over records, data, materials, equipment or specimens of the agricultural research facility with the intent to destroy or conceal the records, data, materials, equipment or specimens; or
- (f) Releases or steals an animal from, or causes the death, injury or loss of an animal at an agricultural research facility.

(2) A person found guilty of committing the crime of interference with agricultural research shall be guilty of a felony and shall be punished by a term of imprisonment of not more than twenty (20) years or by a fine not in excess of ten thousand dollars (\$10,000), or by both such fine and imprisonment.

(3) For purposes of this section:

(a) "Agricultural research facility" means any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural research or experimentation.

(b) "Agricultural research or experimentation" means the lawful study, analysis or testing of plants or animals, or the use of plants or animals to conduct studies, analyses, testing or teaching, for the purpose of improving farming, forestry or animal husbandry.

(4) In addition to any other penalty imposed for a violation of this section, the court shall require any person convicted, found guilty or who pleads guilty to a violation of this section to make restitution to the victim of the offense in accordance with the terms of section 19-5304, Idaho Code; provided, that such award shall be in an amount equal to twice the value of the crop, crop product, timber, timber product, livestock or equipment damaged or destroyed. In ordering restitution under this section, the court shall, in the determination of value, consider:

(a) The market value of the crop, crop product, timber, timber product, livestock, or equipment that has been damaged or destroyed;

(b) Production, research, testing, replacement and development costs directly related to the crop, crop product, timber, timber product, livestock or equipment that has been damaged or destroyed;

(c) the costs of repeating an experiment, including the replacement of the records, data, equipment, specimens, labor and materials, if acts constituting the violation cause the failure of an experiment in progress or irreparably damage completed research or experimentation. [I.C., § 18-7040, as added by 2002, ch. 263, § 1, p. 785.]

18-7041. Damage to aquaculture operations. — (1) It is unlawful for any person to knowingly transfer, damage, vandalize, poison, or knowingly attempt to transfer, damage, vandalize or poison the product or facilities of a posted commercial aquaculture operation in Idaho, or to knowingly release or knowingly allow another person to release any poisonous or dangerous substance that comes in contact with any species in production in an aquaculture operation and causes damage to either the species in production or the aquaculture facility itself.

(2) Any person or persons violating any provision of this section when the value of the damage to either the species in production or the aquaculture facility itself is one thousand dollars (\$1,000) or less shall be guilty of a misdemeanor. Any person or persons violating any provisions of this section when the value of the damage to either the species in production or the aquaculture facility itself is in excess of one thousand dollars (\$1,000) shall be guilty of a felony and upon conviction thereof shall be punished by a term

of imprisonment of not more than twenty (20) years or by a fine not in excess of ten thousand dollars (\$10,000), or by both such fine and imprisonment.

(3) Nothing in this section shall be construed to limit the court's power to order restitution equal to the extent of the damage suffered by the aquaculture operation.

(4) Nothing in this section shall be construed to limit an aquaculture operation from proceeding in a civil action to seek any lawful civil remedy. [I.C., § 18-7041, as added by 2004, ch. 143, § 1, p. 473.]

CHAPTER 71

VAGRANCY

SECTION.

18-7101. [Repealed.]

18-7101. Vagrancy defined — Penalties. [Repealed.]

Compiler's notes. Former § 18-7101 which comprised I.C., § 18-7101 as added by S.L. 1972, ch. 336, § 1 was repealed by S.L. 1972, ch. 381, § 17, effective April 1, 1972.

Another former § 18-7101 which comprised

S.L. 1885, p. 200, § 1; R.S., R.C., & C.L., § 7208; C.S., § 8587; I.C.A., § 17-4601, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

CHAPTER 72

WEIGHTS AND MEASURES

SECTION.

18-7201 — 18-7205. [Repealed.]

18-7206. Use of fraudulent scales for ore.

SECTION.

18-7207. Alteration of ore values.

18-7201 — 18-7205. False weights — Use of and defrauding by false weights and measures — Stamping false weight on package — Sale by ton or pound. [Repealed.]

Compiler's notes. These sections, which comprised Cr. & P. 1864, § 139; R.S., R.C., & C.L., §§ 7105 — 7109; C.S., §§ 8491 — 8495; I.C.A., §§ 17-3920 — 17-3924, were repealed by S.L. 1969, ch. 43, § 36, p. 108, insofar as they might operate in the future; but as to

offenses committed, liabilities incurred, and claims that existed thereunder the sections remained in full force and effect.

The present law concerning weights and measures is compiled in §§ 71-108 — 71-120, 71-229 — 71-243 and 71-303 — 71-308.

18-7206. Use of fraudulent scales for ore. — Every person, association or corporation, or the agent of any person, association or corporation, engaged in the business of milling, sampling, concentrating, reducing, shipping or purchasing ores, who keeps or uses any false or fraudulent scales or weights for weighing ores, who keeps or uses any false or fraudulent assay scales or weights for ascertaining the assay value of ore, knowing them to be false, is guilty of a misdemeanor, and is punishable by a fine in any sum not exceeding \$1000, or by imprisonment in the county jail for a term of not more than one year nor less than one month, or by both

such fine and imprisonment. [I.C., § 18-7206, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1885, p. 30, § 1; R.S., R.C., & C.L., § 7110; C.S., § 8496; I.C.A., § 17-3925 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 1 in the

same words as the section prior to its repeal.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Collateral References. 94 C.J.S., Weights and Measures, § 4.

18-7207. Alteration of ore values. — Every person, corporation or association, or the agent of any person, corporation or association, engaged in milling, sampling, concentrating, reducing, shipping or purchasing ores in this state, who in any manner knowingly alters or changes the true value of any ores delivered to him or them, so as to deprive the seller of the result of the correct value of the same, or who issues any bill of sale or certificate of purchase that does not exactly and truthfully state the actual weight, assay value and total amount paid for any lot or lots of ore purchased, or who, by any secret understanding or agreement with another, issues a bill of sale or certificate of purchase that does not exactly and truthfully state the actual weight, assay value and total amount paid for any lot or lots of ore purchased, or who, by any secret understanding or agreement with another, issues a bill of sale or certificate of purchase that does not truthfully and correctly set forth the weight, assay value and total amount paid for any lot or lots of ore purchased by him, is guilty of a misdemeanor, and shall be punished as provided in the preceding section. [I.C., § 18-7207, as added by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. A former section, which comprised S.L. 1885, p. 30, § 2; R.S., R.C., & C.L., § 7111; C.S., § 8497; I.C.A., § 17-3926 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present

section added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

CHAPTER 73

CIVIL RIGHTS

SECTION.

18-7301. Freedom from discrimination constitutes a civil right.

18-7301A. Freedom of choice in treatment.

SECTION.

18-7302. Definitions.

18-7303. Denial of right to work or accommodations a misdemeanor.

18-7301. Freedom from discrimination constitutes a civil right. — The right to be free from discrimination because of race, creed, color, sex, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(1) The right to obtain and hold employment without discrimination.

(2) The right to the full enjoyment of any of the accommodations, facilities or privileges of any place of public resort, accommodation, assemblage or amusement. [S.L. 1961, ch. 309, § 1, p. 145; I.C., § 18-7301, as reenacted by 1972, ch. 336, § 1, p. 844.]

Cross ref. Commission on human rights, powers and duties, §§ 67-5901 — 5906, 67-5909 — 5912.

ANALYSIS

Construction.

Discrimination based on sex.

Construction.

Although this section merely classifies discriminatory acts as misdemeanors under the penal code, like § 67-5901 of the Idaho Human Rights Act, it also aims to protect against discrimination due to race, color, creed or religion, sex, national origin in connection with employment, public accommodations, or education; however, unlike § 67-5901, this section provides no private cause of action. *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 908 P.2d 1228 (1995).

Discrimination Based on Sex.

The Idaho Civil Rights Act was not violated by § 15-314 (repealed) preferring males to females in the appointment of administrators of estates; the act was inapplicable thereto, and the legislature could not have intended by the act to prohibit all discrimination based on sex. *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635 (1970). However, this decision was overruled in 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), on other grounds, without any reference to the Idaho Civil Rights Act.

Discrimination based upon the differences between men and women which is not wholly irrational or arbitrary and which is utilized to accomplish a legitimate objective was not condemned by the former Idaho Civil Rights Act. *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635 (1970). However, this decision was overruled in 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), on other grounds, without any reference to the Idaho Civil Rights Act.

Although the equal protection clause, 14th Amendment to the United States Constitution does not deny to states the power to treat different classes of persons in different ways, mandatory provision of Idaho Probate Code

(§ 15-314, repealed) giving men preference over women when persons of same class of entitlement apply for appointment as administrator of decedent's estate affords different treatment to persons placed by statute in different classes on basis of criteria wholly unrelated to the objective of the statute and denies to female applicant the right to equal protection of the law. *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971).

Collateral References. 15 Am. Jur. 2d, Civil Rights, § 1 et seq.

14, 14A C.J.S., Civil Rights, § 1 et seq.

Exclusion of person (for reason other than color or race) from place of public entertainment or amusement. 1 A.L.R.2d 1165.

Race or religious beliefs as permissible consideration in choosing tenants or purchasers of real estate. 14 A.L.R.2d 153.

Racial segregation. 38 A.L.R.2d 1188.

Fair employment statutes designed to eliminate racial, religious, or national origin discrimination in private employment. 44 A.L.R.2d 1138; 37 A.L.R.5th 349.

Businesses or establishments falling within state civil rights statute provisions prohibiting discrimination. 87 A.L.R.2d 120.

Discrimination in provision of municipal services or facilities as civil rights violation. 51 A.L.R.3d 950.

Application of state law to sex discrimination in employment advertising. 66 A.L.R.3d 1237.

Application of state law to sex discrimination in sports. 66 A.L.R.3d 1262.

Trailer park as place of public accommodation within meaning of state civil rights statute. 70 A.L.R.3d 1142.

Application of state law to sex discrimination in employment. 87 A.L.R.3d 93.

Judicial construction and application of state legislation prohibiting religious discrimination in employment. 37 A.L.R.5th 349.

What constitutes employment discrimination by public entity in violation of Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12132. 164 A.L.R. Fed. 433.

18-7301A. Freedom of choice in treatment. — The right of any person to use amygdalin (laetrile) as an adjunct in the treatment of any physical condition of the human body shall not be denied, interfered with or obstructed by any other person. [I.C., § 18-7301A, as added by 1978, ch. 129, § 1, p. 290.]

Compiler's notes. The word enclosed in parentheses so appeared in the law as enacted.

18-7302. Definitions. — Terms used in this chapter shall have the following definitions:

(a) "Every person" shall be construed to include any owner, lessee, proprietor, manager, agent or employee whether one or more natural persons, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees, receivers, of this state and its political subdivisions, boards and commissions, engaged in or exercising control over the operation of any place of public resort, accommodation, assemblage or amusement.

(b) "Deny" is hereby defined to include any act which directly or indirectly, or by subterfuge, by a person or his agent or employee, results or is intended or calculated to result in whole or in part in any discrimination, distinction, restriction, or unequal treatment or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement except for conditions and limitations established by law and applicable alike to all persons, regardless of race, creed or color.

(c) "Full enjoyment of" shall be construed to include the right to purchase any service, commodity or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, without acts directly or indirectly causing persons of any particular race, creed or color, to be treated as not welcome, accepted, desired or solicited.

(d) "National origin" includes "ancestry."

(e) "Any place of public resort, accommodation, assemblage or amusement" is hereby defined to include, but not to be limited to any public place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods and merchandise, or for the rendering of personal services, or for public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or any educational institution wholly or partially supported by public funds, or schools of special instruction, or nursery schools, or day care centers or children's camps; nothing herein contained shall be construed to include, or apply to, any institute, bona fide club, or place of accommodation, which is by its nature distinctly private

provided that where public use is permitted that use shall be covered by this section; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution; and the right of a natural parent in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed. [S.L. 1961, ch. 309, § 2, p. 573; I.C., § 18-7302, as reenacted by 1972, ch. 336, § 1, p. 844.]

18-7303. Denial of right to work or accommodations a misdemeanor. — Every person shall be guilty of a misdemeanor who denies to any other person because of race, creed, color, sex, or national origin the right to work: (a) by refusing to hire, (b) by discharging, (c) by barring from employment, or (d) by discriminating against such person in compensation or in other terms or conditions of employment; or who denies to any other person because of race, creed, color, sex, or national origin, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, provided, however, that denial of the right to work on the basis of sex shall be permissible in situations where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business. [S.L. 1961, ch. 309, § 3, p. 573; am. S.L. 1967, ch. 64, § 2, p. 145; I.C., § 18-7303, as reenacted by 1972, ch. 336, § 1, p. 844.]

Compiler's notes. Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107.

Construction.

The enactment of §§ 44-1702, 67-5909 and this section by the legislature expressed a clear, unambiguous intent to prohibit discrimination in employment practices on the basis

of sex, and to effect this policy provided state agencies with authority to seek to enjoin discriminatory practices, and provided aggrieved individuals with the right to seek reinstatement, restoration of wages and even damages. *Idaho Trailer Coach Ass'n v. Brown*, 95 Idaho 910, 523 P.2d 42 (1974).

CHAPTER 74

BAIL JUMPING

SECTION.

18-7401. Bail jumping — Default in required appearance.

18-7401. Bail jumping — Default in required appearance. — A person set at liberty by court order, with or without bail, upon condition that he will subsequently appear at a specified time and place, commits a misdemeanor if, without lawful excuse, he fails to appear at that time and place. The offense constitutes a felony where the required appearance was to answer to a charge of felony, or for disposition of any such charge, and the actor took flight or went into hiding to avoid apprehension, trial or punishment. This section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole. [1972, ch. 381, § 18, p. 1102.]

Compiler's notes. Section 16 of S.L. 1972, ch. 381 is compiled herein as § 19-2601 and § 19 was repealed.

Cross ref. Penalty for misdemeanor when not otherwise provided, § 18-113.

Cited in: Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000).

ANALYSIS

Information.

—Insufficient.

Information.

—**Insufficient.**

Without allegations that the failures to appear occurred in the county, an information

failed to state facts sufficient to confer jurisdiction upon the district court of such county; therefore, the judgment of conviction as to two counts of felony bail jumping must be reversed and the information was dismissed for want of jurisdiction. State v. Pyne, 105 Idaho 427, 670 P.2d 528 (1983).

Collateral References. Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail and same non-capital criminal case. 29 A.L.R.2d 945.

Contempt, bail jumping after conviction, failure to surrender or to appear for sentencing and the like as. 34 A.L.R.2d 1100.

State statutes making default on bail a separate criminal offense. 63 A.L.R.4th 1064.

CHAPTER 75

AIRCRAFT HIJACKING

SECTION.

18-7501. Aircraft hijacking defined — Penalty.

18-7502. Assault with intent to commit aircraft hijacking defined — Penalty.

18-7503. Weapons aboard aircraft — Penalty.

SECTION.

18-7504. Threats made against airline passengers, other persons, commercial airline companies, or aircraft — Penalty.

18-7505. Indictment and trial jurisdiction.

18-7501. Aircraft hijacking defined — Penalty. — The offense of aircraft hijacking is defined as the seizure or exercise of control, by force or violence or threat of force or violence, of any aircraft within the airspace jurisdiction of the state of Idaho. Any person convicted of the offense of aircraft hijacking shall suffer life imprisonment. [I.C., § 18-7501, as added by 1973, ch. 267, § 1, p. 561.]

Cited in: Hays v. State, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987).

Collateral References. 8 Am. Jur. 2d, Aviation, §§ 135, 136.

61 Am. Jur. 2d, Piracy, §§ 5, 6.

2A C.J.S., Aeronautics and Aerospace, §§ 273, 274.

18-7502. Assault with intent to commit aircraft hijacking defined — Penalty. — The offense of assault with intent to commit aircraft hijacking is defined as an intimidation, threat, assault or battery toward any flight crew member, attendant or employee, as to lessen the ability of such member, attendant, or employee to perform his duties, with the intent to commit aircraft hijacking as defined in section 18-7501 of this act. Any person convicted of the offense of assault with intent to commit aircraft hijacking shall suffer life imprisonment. [I.C., § 18-7502, as added by 1973, ch. 267, § 1, p. 561.]

Compiler's notes. The words "this act" refer to S.L. 1973, ch. 267 compiled herein as §§ 18-7501 — 18-7505.

18-7503. Weapons aboard aircraft — Penalty. — (1) No person, while aboard an airplane being operated by a holder of a certificate issued by the federal government or the state of Idaho, shall carry on or about his person a deadly or dangerous weapon, either concealed or unconcealed; nor shall any person enter or attempt to enter any sterile area of an airport, which is a holder of a certificate issued by the federal government or the state of Idaho, while knowingly carrying on or about his person, or in a bag, case, pouch or other container, a deadly or dangerous weapon, either concealed or unconcealed. Any person who pleads guilty or is found guilty of this subsection shall be guilty of a misdemeanor. As used in this section “sterile area” shall mean that area of a certificated airport to which access is controlled as required by the federal aviation administration regulations.

(2) No person, while aboard an airplane being operated by a holder of a certificate issued by the federal government or the state of Idaho, shall willfully and intentionally conceal on or about his person, or in a bag, case, pouch or other container any deadly or dangerous weapon; nor shall any person enter or attempt to enter any sterile area of an airport which is a holder of a certificate issued by the federal government or the state of Idaho, while willfully and intentionally concealing on or about his person, or in a bag, case, pouch or other container any deadly or dangerous weapon with the intent to avoid its detection by security measures at the sterile area.

(3) This section does not apply to:

(a) Law enforcement officials of a city, county or state, or of the United States, who are authorized to carry arms and who have fulfilled the requirements of federal aviation administration regulations 107 and 108 in effect on January 1, 2001, and as may be amended from time to time;

(b) Crew members and other persons authorized by the certificate holder to carry arms; .

(c) Parties chartering an aircraft for the purpose of hunting when a weapon is properly stored and/or in the custody of the pilot in command of the aircraft; or

(d) An aircraft owner and his invited guests when the weapon is properly stored and/or in the custody of the pilot of the aircraft.

(4) Any person convicted of violating the provisions of subsection (2) of this section shall be guilty of a felony, punishable by imprisonment in the state prison not exceeding five (5) years or by fine not exceeding five thousand dollars (\$5,000) or by both such fine and imprisonment.

(5) Any person presenting a ticket to board any commercial or charter aircraft shall by such presentation consent to a search or screening of his person or personal belongings by the aircraft company boarding him, by personnel of the airport from which the flight is originating, persons authorized by federal aviation administration regulations or by law enforcement officials. In case said person shall refuse to submit to a search or screening of his person or personal belongings by said aircraft company personnel, airport personnel, federal aviation administration regulation authorized personnel, federal employees or law enforcement officials the person refusing shall be denied the right to board said commercial or charter aircraft.

(6) Any person entering or attempting to enter into the sterile area of an airport shall be presumed to have fully consented to a search of their person, clothing and belongings including, but not limited to, any bags, cases, pouches or other containers with which they are associated. Such full consent shall remain until the aircraft shall depart from the airport.

(7) No person in, near or attempting to enter a sterile area of a certificated airport shall assault, obstruct or delay any aircraft company personnel, airport personnel, federal aviation administration regulation authorized personnel, federal employee or law enforcement official in the performance of their assigned duties within the airport.

(8) No action, either at law or equity, shall be brought against any commercial or charter airline company or airport operating in this state for the refusal of said company or airport to permit a person to board said aircraft where said person has refused to be searched as set out in subsections (5) and (6) of this section. [I.C., § 18-7503, as added by 1973, ch. 267, § 1, p. 561; am. 2002, ch. 221, § 1, p. 621.]

Compiler's notes. Section 2 of S.L. 2002, ch. 221 declared an emergency. Approved March 22, 2002.

18-7504. Threats made against airline passengers, other persons, commercial airline companies, or aircraft — Penalty. — (1) Every person who knowingly and wilfully threatens the safety and well-being of any passenger, flight crew member or flight attendant, aboard any aircraft by making telephone, verbal, or written threats against any airline or aircraft within the airspace jurisdiction of the state of Idaho shall be guilty of a felony.

(2) Any person who seizes, confines, or kidnaps another person against his will or without authority of law, or who threatens the safety and well-being of any person, with the intent to hold such person hostage or use such person for the purpose of aircraft hijacking shall be guilty of a felony. [I.C., § 18-7504, as added by 1973, ch. 267, § 1, p. 561; am. 1988, ch. 273, § 1, p. 903.]

Compiler's notes. Section 2 of S.L. 1988, ch. 273 declared an emergency. Approved March 31, 1988.

Cross ref. Punishment for felony not otherwise provided, § 18-112.

18-7505. Indictment and trial jurisdiction. — Any offense occurring aboard an aircraft is declared to be a continuing offense from the point of beginning to the point of termination of the flight, and jurisdiction to prosecute a person accused of such an offense shall be in any county of Idaho over which or in which the aircraft is being operated. [I.C., § 18-7505, as added by 1973, ch. 267, § 1, p. 561; am. 1988, ch. 272, § 1, p. 902.]

Compiler's notes. Section 2 of S.L. 1973, ch. 267 declared an emergency. Approved March 17, 1973.

Section 2 of S.L. 1988, ch. 272 declared an emergency. Approved March 31, 1988.

CHAPTER 76

TAPE PIRACY ACT

SECTION.

- 18-7601. Short title.
- 18-7602. Definitions.
- 18-7603. Unlawful transfer, sale, distribution, advertisement.
- 18-7604. Penalties.

SECTION.

- 18-7605. Confiscation of equipment.
- 18-7606. Exceptions.
- 18-7607. Act not an exclusive remedy.
- 18-7608. Severability.

18-7601. Short title. — This act shall be known as the “Idaho Tape Piracy Act of 1976.” [I.C., § 18-7601, as added by 1976, ch. 112, § 1, p. 440.]

Compiler’s notes. The words “this act” contained herein refer to §§ 18-7601 — 18-7608.

18-7602. Definitions. — As used in this chapter, the terms defined in this section shall have the following meanings, unless the context clearly indicates another meaning:

- (1) “Person” means any individual, firm, partnership, corporation or association of individuals.
- (2) “Owner” means the person who owns the original fixation of sounds embodied in the master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded, and from which transferred recorded sounds are directly derived. [I.C., § 18-7602, as added by 1976, ch. 112, § 1, p. 440.]

18-7603. Unlawful transfer, sale, distribution, advertisement. — It shall be unlawful and punishable:

- (1) For any person to knowingly, and without the consent of the owner, transfer or cause to be transferred or recorded any sounds previously recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded with the intent to sell such articles, or cause them to be sold for profit or used to promote the sale of any product.
- (2) For any person to knowingly, or with reasonable grounds to know, advertise, or offer for sale or resale, or sell or resell, distribute or possess for such purposes, any article that has been produced in violation of the provisions of subsection (1) of this section.
- (3) For any person to advertise, or offer for sale or resale, or sell or resell, or possess for such purposes, any phonograph record, disc, wire, tape, film or other article on which sounds are recorded, unless the outside cover, box, jacket or container clearly and conspicuously discloses the actual name and address of the manufacturer thereof, and the name of the actual performer or group. [I.C., § 18-7603, as added by 1976, ch. 112, § 1, p. 440.]

Compiler’s notes. As enacted the section heading of this section read “Unlawful transfer — Sale, distribution, advertisement.” **Sec. to sec. ref.** This section is referred to in § 18-7605.

18-7604. Penalties. — (1) Any person who violates subsection (1) of section 18-7603, Idaho Code, is guilty of a felony and upon conviction may be fined not more than ten thousand dollars (\$10,000), or imprisoned for not more than four (4) years, or both such fine and imprisonment. Each recording of the original fixation of sounds without consent of the owner thereof shall constitute a separate offense.

(2) Any person who violates subsection (2) or (3) of section 18-7603, Idaho Code, is guilty of a misdemeanor and upon conviction may be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than six (6) months, or both such fine and imprisonment. [I.C., § 18-7604, as added by 1976, ch. 112, § 1, p. 440.]

18-7605. Confiscation of equipment. — Any article produced in violation of section 18-7603, Idaho Code, and any equipment used for such purpose, shall be subject to confiscation and destruction by the appropriate law enforcement agency. [I.C., § 18-7605, as added by 1976, ch. 112, § 1, p. 440.]

18-7606. Exceptions. — The provisions of this act shall not apply to any broadcaster, who, in connection with or as part of a radio, television, or cable broadcast transmission, or for the purpose of archival preservation, transfers any such sounds recorded on a sound recording. [I.C., § 18-7606, as added by 1976, ch. 112, § 1, p. 440.]

Compiler's notes. For words "this act", see Compiler's notes, § 18-7601.

18-7607. Act not an exclusive remedy. — This act shall not be deemed an exclusive remedy for persons affected or injured by acts herein proscribed. [I.C., § 18-7607, as added by 1976, ch. 112, § 1, p. 440.]

Compiler's notes. For words "this act", see Compiler's notes, § 18-7601.

18-7608. Severability. — If any provisions of this act, or the application thereof to any person or circumstances, is held invalid as unconstitutional or ineffective for any reason, such invalidity shall not affect other provisions or applications of the act, and to this end the provisions of this [act] are severable. [I.C., § 18-7608, as added by 1976, ch. 112, § 1, p. 440.]

Compiler's notes. The bracketed word "act" was inserted by the compiler.

For words "this act", see Compiler's notes, § 18-7601.

CHAPTER 77

MOTION PICTURE FAIR BIDDING ACT

SECTION.

18-7701. Short title.

18-7702. Definitions.

18-7703. Prohibition on blind bidding.

18-7704. Prohibition on minimum fee guarantee.

18-7705. Availability of information on trade screening.

SECTION.

18-7706. Prohibition on requirement of advance payment as security.

18-7707. Unenforceability of waiver provision.

18-7708. Penalty.

18-7701. Short title. — This act shall be known and may be cited as the “Motion Picture Fair Bidding Act.” [1979, ch. 119, § 1, p. 368.]

Compiler’s notes. The words “this act” refer to S.L. 1979, ch. 119 compiled as §§ 18-7701 — 18-7708.

18-7702. Definitions. — As used in this act:

(1) “Blind bidding” means bidding, negotiating, offering terms, making an invitation to bid, or agreeing to terms for the purpose of entering into a license agreement prior to a trade screening of the motion picture that is the subject of the agreement.

(2) “Distributor” means any person engaged in the business of renting, selling or licensing motion pictures to exhibitors.

(3) “Exhibitor” means any person engaged in the business of operating a theatre in this state.

(4) “License agreement” means any contract between a distributor and an exhibitor for the exhibition of a motion picture by the exhibitor of this state.

(5) “Theatre” means any establishment in which motion pictures are exhibited regularly to the public for a charge.

(6) “Trade screening” means the showing of a motion picture by a distributor, and such showing shall be open to any exhibitor interested in exhibiting the motion picture. [1979, ch. 119, § 2, p. 368.]

Compiler’s notes. For words “this act,” see compiler’s notes, § 18-7701.

18-7703. Prohibition on blind bidding. — No distributor shall engage in blind bidding. [1979, ch. 119, § 3, p. 368.]

18-7704. Prohibition on minimum fee guarantee. — (1) It shall be unlawful for any license agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a theatre within the state to contain or be conditioned upon a guarantee of a minimum payment to the distributor.

(2) Any provision, agreement or understanding which provides for such a guarantee shall be void, and any purported waiver of the prohibition in subsection (1) of section 4 [this section] of this act shall be void and unenforceable. [1979, ch. 119, § 4, p. 368.]

Compiler's notes. The bracketed words "this section" were inserted by the compiler.

18-7705. Availability of information on trade screening. — If bids are solicited from exhibitors for the purpose of entering into a license agreement, the bid shall include in the invitation to bid the date, time and location of the trade screening of the motion picture that is the subject of the invitation to bid. [1979, ch. 119, § 5, p. 368.]

18-7706. Prohibition on requirement of advance payment as security. — (1) It shall be unlawful for any license agreement for the exhibition of a motion picture at a theatre within the state to contain or be conditioned upon a provision, agreement or understanding that the exhibitor shall advance any funds prior to the exhibition of the picture as security for the performance of the license agreement or to be applied to payments under such agreement.

(2) Any provision, agreement or understanding which provides for such an advance shall be void, and any purported waiver of the prohibition in subsection (1) of section 6 [this section] of this act shall be void and unenforceable. [1979, ch. 119, § 6, p. 368.]

Compiler's notes. The bracketed words "this section" were inserted by the compiler.

18-7707. Unenforceability of waiver provision. — Any provision of an invitation to bid or a license agreement that waives any of the prohibitions of or fails to comply with this act is void and unenforceable. [1979, ch. 119, § 7, p. 368.]

Compiler's notes. For words "this act," see compiler's notes, § 18-7701.

18-7708. Penalty. — It shall be unlawful for any person to willfully violate any provision of this act. Any such violation shall constitute a misdemeanor. [1979, ch. 119, § 8, p. 368.]

Compiler's notes. For words "this act," see compiler's notes, § 18-7701.

Section 9 of S.L. 1979, ch. 119 read: "If any provision of this act, or the application of any provision to any person or circumstance is

held invalid, the remainder of this act shall not be affected thereby."

Cross ref. Punishment for misdemeanor, § 18-113.

CHAPTER 78

RACKETEERING ACT

SECTION.

18-7801. Short title.

18-7802. Purpose.

18-7803. Definitions. [Effective until September 1, 2004.]

SECTION.

18-7803. Definitions. [Effective September 1, 2004.]

18-7804. Prohibited activities — Penalties.

18-7805. Racketeering — Civil remedies.

18-7801. Short title. — This act shall be known and may be cited as the “Racketeering Act.” [I.C., § 18-7801, as added by 1981, ch. 219, § 1, p. 407.]

Compiler’s notes. The words “this act” refer to S.L. 1981, ch. 219, which is compiled as §§ 18-7801 — 18-7805.

Collateral References. Criminal prosecutions under state RICO statutes for engaging in organized criminal activity. 89 A.L.R.5th 629.

Validity, construction, and application of Racketeer Influenced and Corrupt Organization Act, 18 U.S.C.A. §§ et seq. — Supreme Court cases. 171 A.L.R. Fed. 1.

18-7802. Purpose. — The purpose of this act is to eliminate the infiltration and illegal acquisition of legitimate economic enterprise by racketeering practices and to eliminate the use of legal and illegal enterprises to further criminal activities. [I.C., § 18-7802, as added by 1981, ch. 219, § 1, p. 407.]

Compiler’s notes. For sections in which “this act” is compiled, see Compiler’s notes to § 18-7801.

18-7803. Definitions. [Effective until September 1, 2004.] — As used in this chapter, (a) “Racketeering” means any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other jurisdiction:

- (1) Homicide (section 18-4001, Idaho Code);
- (2) Robbery, burglary, theft, forgery, counterfeiting, and related crimes (sections 18-1401, 18-1405, 18-2403, 18-2407, 18-3123, 18-3124, 18-3125, 18-3601, 18-3602, 18-3603, 18-3605, 18-3606, 18-3607, 18-3609, 18-3610, 18-3614, 18-3615, 18-4630, 18-6501 and 49-518, Idaho Code);
- (3) Kidnapping (section 18-4501, Idaho Code);
- (4) Prostitution (sections 18-5601, 18-5602, 18-5603, 18-5604, 18-5605, 18-5606, 18-5608 and 18-5609, Idaho Code);
- (5) Arson (sections 18-801, 18-802, 18-803, 18-804 and 18-805, Idaho Code);
- (6) Assault (sections 18-908 and 18-4015, Idaho Code);
- (7) Lotteries and gambling (sections 18-3801, 18-3802, 18-3809, 18-4902, 18-4903, 18-4904, 18-4905, 18-4906 and 18-4908, Idaho Code);
- (8) Indecency and obscenity (sections 18-1515, 18-1518, 18-4103, 18-4103A, 18-4104, 18-4105, 18-4105A and 18-4107, Idaho Code);
- (9) Poisoning (sections 18-4014 and 18-5501, Idaho Code);
- (10) Fraudulent practices, false pretenses, insurance fraud, financial transaction card crimes and fraud generally (sections 18-2403, 18-2706, 18-3002, 18-3101, 18-3124, 18-3125, 18-3126, 18-6713, 41-293, 41-294 and 41-1306, Idaho Code);
- (11) Alcoholic beverages (sections 23-602, 23-606, 23-610, 23-703, 23-905, 23-914, 23-928, 23-934 and 23-938, Idaho Code);
- (12) Cigarette taxes (sections 63-2505 and 63-2512(b), Idaho Code);
- (13) Securities (sections 30-1403, 30-1403A, 30-1404, 30-1405, 30-1406, 30-1438 and 30-1439, Idaho Code);
- (14) Horseracing (section 54-2512, Idaho Code);

- (15) Interest and usurious practices (sections 28-45-401 and 28-45-402, Idaho Code);
- (16) Corporations (sections 18-1901, 18-1902, 18-1903, 18-1904, 18-1905, 18-1906 and 30-1510, Idaho Code);
- (17) Perjury (sections 18-5401 and 18-5410, Idaho Code);
- (18) Bribery and corrupt influence (sections 18-1352 and 18-1353, Idaho Code);
- (19) Controlled substances (sections 37-2732(a), (b), (c), (e) and (f), 37-2732B, 37-2734 and 37-2734B, Idaho Code);
- (20) Motor vehicles (sections 49-228, 49-231, 49-232 and 49-518, Idaho Code);
- (21) Terrorism (section 18-8103, Idaho Code).

(b) "Person" means any individual or entity capable of holding a legal or beneficial interest in property;

(c) "Enterprise" means any sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or any group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities; and

(d) "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one (1) of such incidents occurred after the effective date of this act and that the last of such incidents occurred within five (5) years after a prior incident of racketeering conduct. [I.C., § 18-7803, as added by 1981, ch. 219, § 1, p. 407; am. 1988, ch. 265, § 562, p. 549; am. 1999, ch. 143, § 3, p. 407; am. 2000, ch. 148, § 4, p. 377; am. 2002, ch. 222, § 5, p. 623; am. 2004, ch. 49, § 3, p. 233.]

Compiler's notes. For this section effective as of September 1, 2004, see the following section, also numbered § 18-7803.

Sections 561 and 563 of S.L. 1988, ch. 265 are compiled as §§ 18-7011 and 18-8001.

Section 2 of S.L. 1999, ch. 143 is compiled as § 37-2732B.

Sections 4 and 6 of S.L. 2002, ch. 222 are compiled as §§ 18-4003 and 18-8102, respectively.

Section 586 of S.L. 1988, ch. 265 provided that the act should take effect on and after January 1, 1989.

Section 2 of S.L. 2004, ch. 49 contains a repeal.

Sec. to sec. ref. This section is referred to in § 18-8201.

Cited in: *Eliopoulos v. Knox*, 123 Idaho 400, 848 P.2d 984 (Ct. App. 1992).

ANALYSIS

Enterprise.

"Pattern of activity."

Racketeering.

Enterprise.

The language of subsection (c) of this section explicitly rejects the proposition that the State must prove an absolute focus of intent in order to prove that the participants shared a common purpose in the pattern of racketeering activity, by including sole proprietorships, partnerships, corporations, businesses, labor unions, associations and other legal entities within the definition of enterprise. *State v. Hansen*, 125 Idaho 927, 877 P.2d 898 (1994).

Where the mere fact that the defendant stole money and drugs from the drug task force of which he was a member did not establish the requisite relationship between the criminal acts and the affairs of the enterprise, his illegal conduct was theft by an employee and not racketeering activity. *State v. Nunez*, 133 Idaho 13, 981 P.2d 738 (1999).

"Pattern of Activity."

Although a single scheme may be sufficient to establish a pattern of activity, the plaintiff's amended complaint which only alleged one general scheme of racketeering, the purpose of which was to defraud the plaintiffs out

of their ranch, failed to show that the predicate acts themselves amounted to, or constituted a threat of continuing racketeering activity, and therefore did not meet the requirements of subsection (d) of this section. *Spence v. Howell*, 126 Idaho 763, 890 P.2d 714 (1995).

Insurance company's single act of hiring of police officer who was on administrative leave to investigate an accident in a wrongful death action did not constitute a "pattern of racketeering activity"; thus, claim against insurance company for violation of bribery and corrupt influences statutes failed. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

Because defendant's securities convictions under §§ 30-1403 and 30-1406 were affirmed, she engaged in conduct that is "racketeering", under the definition contained in subsection (a) of this section; additionally, because she engaged in such activity at least twice, because the instances were all interrelated, and because the instances all occurred within five years of each other, a "pattern of racketeering

activity" existed under subsection (d) of this section. *State v. Gertsch*, 17 Idaho 387, 49 P.3d 392 (2002).

Racketeering.

Controlled substance violations are included in the definition of "racketeering" through subsection (a)(20) of this section, and where group with which defendant was involved committed at least two distinct, interrelated controlled substance violations within five years, such conduct was facially prohibited by the plain meaning of subsections (a)(20) and (d) of this section. *State v. Hansen*, 125 Idaho 927, 877 P.2d 898 (1994).

Scienter is not required for violations of the securities registration and licensing requirements found in §§ 30-1406 through 30-1416; therefore, because defendant's racketeering charge was predicated on twenty-three counts of violating § 30-1406, a strict liability provision, good faith reliance on legal counsel is not a defense to violations of the Idaho Securities Act. *State v. Montgomery*, 135 Idaho 348, 17 P.3d 292 (2001).

18-7803. Definitions. [Effective September 1, 2004.] — As used in this chapter, (a) "Racketeering" means any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other jurisdiction:

- (1) Homicide (section 18-4001, Idaho Code);
- (2) Robbery, burglary, theft, forgery, counterfeiting, and related crimes (sections 18-1401, 18-1405, 18-2403, 18-2407, 18-3123, 18-3124, 18-3125, 18-3601, 18-3602, 18-3603, 18-3605, 18-3606, 18-3607, 18-3609, 18-3610, 18-3614, 18-3615, 18-4630, 18-6501 and 49-518, Idaho Code);
- (3) Kidnapping (section 18-4501, Idaho Code);
- (4) Prostitution (sections 18-5601, 18-5602, 18-5603, 18-5604, 18-5605, 18-5606, 18-5608 and 18-5609, Idaho Code);
- (5) Arson (sections 18-801, 18-802, 18-803, 18-804 and 18-805, Idaho Code);
- (6) Assault (sections 18-908 and 18-4015, Idaho Code);
- (7) Lotteries and gambling (sections 18-3801, 18-3802, 18-3809, 18-4902, 18-4903, 18-4904, 18-4905, 18-4906 and 18-4908, Idaho Code);
- (8) Indecency and obscenity (sections 18-1515, 18-1518, 18-4103, 18-4103A, 18-4104, 18-4105, 18-4105A and 18-4107, Idaho Code);
- (9) Poisoning (sections 18-4014 and 18-5501, Idaho Code);
- (10) Fraudulent practices, false pretenses, insurance fraud, financial transaction card crimes and fraud generally (sections 18-2403, 18-2706, 18-3002, 18-3101, 18-3124, 18-3125, 18-3126, 18-6713, 41-293, 41-294 and 41-1306, Idaho Code);
- (11) Alcoholic beverages (sections 23-602, 23-606, 23-610, 23-703, 23-905, 23-914, 23-928, 23-934 and 23-938, Idaho Code);
- (12) Cigarette taxes (sections 63-2505 and 63-2512(b), Idaho Code);
- (13) Securities (sections 30-14-401, 30-14-402, 30-14-403, 30-14-404, 30-14-501, 30-14-502, 30-14-505 and 30-14-506, Idaho Code);

- (14) Horseracing (section 54-2512, Idaho Code);
- (15) Interest and usurious practices (sections 28-45-401 and 28-45-402, Idaho Code);
- (16) Corporations (sections 18-1901, 18-1902, 18-1903, 18-1904, 18-1905, 18-1906 and 30-1510, Idaho Code);
- (17) Perjury (sections 18-5401 and 18-5410, Idaho Code);
- (18) Bribery and corrupt influence (sections 18-1352 and 18-1353, Idaho Code);
- (19) Controlled substances (sections 37-2732(a), (b), (c), (e) and (f), 37-2732B, 37-2734 and 37-2734B, Idaho Code);
- (20) Motor vehicles (sections 49-228, 49-231, 49-232 and 49-518, Idaho Code);
- (21) Terrorism (section 18-8103, Idaho Code).

(b) "Person" means any individual or entity capable of holding a legal or beneficial interest in property;

(c) "Enterprise" means any sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or any group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities; and

(d) "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one (1) of such incidents occurred after the effective date of this act and that the last of such incidents occurred within five (5) years after a prior incident of racketeering conduct. [I.C., § 18-7803, as added by 1981, ch. 219, § 1, p. 407; am. 1988, ch. 265, § 562, p. 549; am. 1999, ch. 143, § 3, p. 407; am. 2000, ch. 148, § 4, p. 377; am. 2002, ch. 222, § 5, p. 623; am. 2004, ch. 45, § 4, p. 169; am. 2004, ch. 49, § 3, p. 233.]

Compiler's notes. For this section as effective until September 1, 2004, see the preceding section, also numbered § 18-7803.

18-7804. Prohibited activities — Penalties. — (a) It is unlawful for any person who has received any proceeds derived directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property. Whoever violates this subsection is guilty of a felony.

(b) It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property. Whoever violates this subsection is guilty of a felony.

(c) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of the affairs of such enterprise by engaging in a pattern of racketeering activity. Whoever violates the provisions of this subsection is guilty of a felony.

(d) It is unlawful for any person to conspire to violate any of the provisions of subsections (a) through (c) of this section. Whoever violates the provisions of this subsection is guilty of a felony.

(e) Whoever violates the provisions of this act is punishable by a fine not to exceed twenty-five thousand dollars (\$25,000) and/or imprisonment not to exceed a term of fourteen (14) years in the Idaho state penitentiary.

(f) Upon a conviction of a violation under the provisions of this chapter, the court may order restitution for all costs and expenses of prosecution and investigation, pursuant to the terms and conditions set forth in section 37-2732(k), Idaho Code.

(g) In addition to any other penalties prescribed by law, whoever violates any provisions of this act shall forfeit to the state of Idaho:

(1) Any interest acquired or maintained in violation of the racketeering act; and

(2) Any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted or participated in the conduct of in violation of the provisions of the racketeering act.

(h) In any action brought by the state under the racketeering act, the district court shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under the provisions of this section, as it shall deem proper.

(i) Upon conviction of a person under the provisions of this section, the court shall authorize the attorney general or the proper prosecuting attorney to seize all property or other interest declared forfeited under the provisions of this section upon such terms and conditions as the court shall deem proper, making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the convicted person, it shall expire and shall not revert to the convicted person. [I.C., § 18-7804, as added by 1981, ch. 219, § 1, p. 407; am. 1993, ch. 105, § 2, p. 266.]

Compiler's notes. For sections in which "this act" is compiled, see Compiler's notes to § 18-7801.

Sections 1 and 3 of S.L. 1993, ch. 105 are compiled as §§ 37-2732 and 18-8201, respectively.

Sec. to sec. ref. This section is referred to in §§ 19-5506 and 37-2732.

Cited in: *Eliopoulos v. Knox*, 123 Idaho 400, 848 P.2d 984 (Ct. App. 1992).

ANALYSIS

Restitution.

Theft by an employee not racketeering.

Restitution.

Trial court abused its discretion in ordering a defendant, convicted of racketeering for his participation in growing and processing mar-

ijuana, to pay restitution to the county for costs of investigating and prosecuting the action against him; as it existed during the period relevant to defendant's appeal, this section was limited to a conviction of felony violation under the controlled substance act. *State v. Hansen*, 125 Idaho 927, 877 P.2d 898 (1994).

Theft by an Employee Not Racketeering.

Where the mere fact that the defendant stole money and drugs from the drug task force of which he was a member did not establish the requisite relationship between the criminal acts and the affairs of the enterprise, his illegal conduct was theft by an employee and not racketeering activity. *State v. Nunez*, 133 Idaho 13, 981 P.2d 738 (1999).

Collateral References. Criminal prosecutions under state RICO statutes for engaging

in organized criminal activity. 89 A.L.R.5th 629.

18-7805. Racketeering — Civil remedies. — (a) A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees.

(b) The state, through the attorney general or the proper county prosecuting attorney, may file an action on behalf of those persons injured or to prevent, restrain or remedy racketeering as defined by the racketeering act.

(c) The district court has jurisdiction to prevent, restrain and remedy racketeering after making provisions for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

(d) Following a determination of liability, such orders may include, but are not limited to:

- (1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise;
- (2) Imposing reasonable restrictions on the future activities or investments of any person;
- (3) Ordering dissolution or reorganization of any enterprise;
- (4) Ordering the payment of three (3) times the damages proved to those persons injured by racketeering;
- (5) Ordering the suspension or revocation of a license, permit or prior approval granted to any enterprise by any agency of the state;
- (6) Ordering the forfeiture of the charter of a corporation organized under the laws of the state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state; and
- (7) Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering incurred by a municipal, county or state government agency to the agency incurring the costs or expenses. [I.C., § 18-7805, as added by 1981, ch. 219, § 1, p. 407; am. 1998, ch. 111, § 1, p. 415.]

CHAPTER 79

MALICIOUS HARASSMENT

SECTION.

18-7901. Purpose.

18-7902. Malicious harassment defined —
Prohibited.

18-7903. Penalties — Criminal and civil.

SECTION.

18-7904. Effect of invalidity of part of this
act.

18-7905. Stalking in the first degree.

18-7906. Stalking in the second degree.

18-7901. Purpose. — The legislature finds and declares that it is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of groups and individuals. It is not the intent of this act to interfere with the exercise of rights protected by the constitution of the United States. The legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any subject whatsoever and to associate with others who share similar beliefs. The legislature further finds that the advocacy of unlawful acts by groups or individuals against other persons or groups for the purpose of inciting and provoking damage to property and bodily injury or death to persons is not constitutionally protected, poses a threat to public order and safety, and should be subject to criminal sanctions. [I.C., § 18-7901, as added by 1983, ch. 110, § 2, p. 236.]

Compiler’s notes. Section 1 of S.L. 1983, ch. 110 read: “It is not the intent of the legislature that this chapter be construed or used to support ratification by the United States Senate of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948.”

The words “this act” refer to S.L. 1983, ch. 110, which is compiled as §§ 18-7901 — 18-7904.

Application.

Court rejected an employee’s claim that Idaho Code § 18-7901 expressed a public pol-

icy extending constitutional free speech protection to relationships between private employers and its employees; even had the trial court specifically addressed the issue, which it did not, the facts alleged fell short of describing conduct that was harassing, intimidating, or threatening and based upon the descriptive list set forth in the statute. *Edmondson v. Shearer Lumber Prods.*, — Idaho —, 75 P.3d 733 (2003), cert. denied, — U.S. —, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004).

18-7902. Malicious harassment defined — Prohibited. — It shall be unlawful for any person, maliciously and with the specific intent to intimidate or harass another person because of that person’s race, color, religion, ancestry, or national origin, to:

- (a) Cause physical injury to another person; or
- (b) Damage, destroy, or deface any real or personal property of another person; or
- (c) Threaten, by word or act, to do the acts prohibited if there is reasonable cause to believe that any of the acts described in subsections (a) and (b) of this section will occur.

For purposes of this section, “deface” shall include, but not be limited to, cross-burnings or the placing of any word or symbol commonly associated with racial, religious or ethnic terrorism on the property of another person without his or her permission. [I.C., § 18-7902, as added by 1983, ch. 110, § 2, p. 236.]

Sec. to sec. ref. This section is referred to in § 18-7905.

Cited in: *State v. Rae*, — Idaho —, 84 P.3d 586 (Ct. App. 2004).

18-7903. Penalties — Criminal and civil. — (a) Malicious harassment is punishable by imprisonment in the state prison for a period not to exceed five (5) years or by fine not exceeding five thousand dollars (\$5,000) or by both.

(b) In addition to the criminal penalty provided in subsection (a) of this section, there is hereby created a civil cause of action for malicious harassment. A person may be liable to the victim of malicious harassment for both special and general damages, including but not limited to damages for emotional distress, reasonable attorney fees and costs, and punitive damages.

(c) The penalties provided in this section for malicious harassment do not preclude victims from seeking any other remedies, criminal or civil, otherwise available under law. [I.C., § 18-7903, as added by 1983, ch. 110, § 2, p. 236; am. 1987, ch. 275, § 1, p. 568.]

18-7904. Effect of invalidity of part of this act. — If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section, or part of this act, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this act, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this act so adjudged to be invalid or unconstitutional. [I.C., § 18-7904, as added by 1983, ch. 110, § 2, p. 236.]

Compiler's notes. For words "this act" see Compiler's notes, § 18-7901.

18-7905. Stalking in the first degree. — (1) A person commits the crime of stalking in the first degree if the person violates section 18-7906, Idaho Code, and:

- (a) The actions constituting the offense are in violation of a temporary restraining order, protection order, no contact order or injunction, or any combination thereof; or
- (b) The actions constituting the offense are in violation of a condition of probation or parole; or
- (c) The victim is under the age of sixteen (16) years; or
- (d) At any time during the course of conduct constituting the offense, the defendant possessed a deadly weapon or instrument; or
- (e) The defendant has been previously convicted of a crime under this section or section 18-7906, Idaho Code, or a substantially conforming foreign criminal violation within seven (7) years, notwithstanding the form of the judgment or withheld judgment; or
- (f) The defendant has been previously convicted of a crime, or an attempt, solicitation or conspiracy to commit a crime, involving the same victim as the present offense under any of the following provisions of Idaho Code or a substantially conforming foreign criminal violation within seven (7) years, notwithstanding the form of the judgment or withheld judgment:
 - (i) Chapter 9, title 18;
 - (ii) Chapter 15, title 18;
 - (iii) Chapter 61, title 18;
 - (iv) Section 18-4014 (administering poison with intent to kill);
 - (v) Section 18-4015 (assault with intent to murder);
 - (vi) Section 18-4501 (kidnapping);

- (vii) Section 18-5501 (poisoning);
- (viii) Section 18-6608 (forcible sexual penetration by use of foreign object);
- (ix) Section 18-7902 (malicious harassment); or
- (x) Section 18-8103 (act of terrorism).

(2) In this section, “course of conduct” and “victim” have the meanings given in section 18-7906(2), Idaho Code.

(3) For the purpose of this section, a “substantially conforming foreign criminal violation” exists when a person has pled guilty to or has been found guilty of a violation of any federal law or law of another state, or any valid county, city, or town ordinance of another state substantially conforming to the provisions of this section or section 18-7906, Idaho Code. The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court.

(4) Stalking in the first degree is a felony punishable by a fine not exceeding ten thousand dollars (\$10,000) or imprisonment in the state prison for not less than one (1) year nor more than five (5) years, or by both such fine and imprisonment. [I.C., § 18-7905, as added by 2004, ch. 337, § 3, p. 1007.]

Compiler’s notes. Former § 18-7905 which comprised I.C., § 18-7905, as added by 1992, ch. 227, § 1, p. 677, was repealed by S.L. 2004, ch. 337, § 2.

Section 2 of S.L. 2004, ch. 337 contained a

repeal, and section 4 is compiled as § 18-7906.

Sec. to sec. ref. This section is referred to in §§ 18-920 and 19-603.

18-7906. Stalking in the second degree. — (1) A person commits the crime of stalking in the second degree if the person knowingly and maliciously:

(a) Engages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress; or

(b) Engages in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.

(2) As used in this section:

(a) “Course of conduct” means repeated acts of nonconsensual contact involving the victim or a family or household member of the victim, provided however, that constitutionally protected activity is not included within the meaning of this definition.

(b) “Family or household member” means:

(i) A spouse or former spouse of the victim, a person who has a child in common with the victim regardless of whether they have been married, a person with whom the victim is cohabiting whether or not they have married or have held themselves out to be husband or wife, and persons related to the victim by blood, adoption or marriage; or

(ii) A person with whom the victim is or has been in a dating relationship, as defined in section 39-6303, Idaho Code; or

(iii) A person living in the same residence as the victim.

(c) "Nonconsensual contact" means any contact with the victim that is initiated or continued without the victim's consent, that is beyond the scope of the consent provided by the victim, or that is in disregard of the victim's expressed desire that the contact be avoided or discontinued. "Nonconsensual contact" includes, but is not limited to:

- (i) Following the victim or maintaining surveillance, including by electronic means, on the victim;
- (ii) Contacting the victim in a public place or on private property;
- (iii) Appearing at the workplace or residence of the victim;
- (iv) Entering onto or remaining on property owned, leased or occupied by the victim;
- (v) Contacting the victim by telephone or causing the victim's telephone to ring repeatedly or continuously regardless of whether a conversation ensues;
- (vi) Sending mail or electronic communications to the victim; or
- (vii) Placing an object on, or delivering an object to, property owned, leased or occupied by the victim.

(d) "Victim" means a person who is the target of a course of conduct.

(3) Stalking in the second degree is punishable by imprisonment in the county jail for not more than one (1) year or by a fine of not more than one thousand dollars (\$1,000), or by both such fine and imprisonment. [I.C., § 18-7906, as added by 2004, ch. 337, § 4, p. 1007.]

Compiler's notes. Section 5 of S.L. 2004, ch. 337 is compiled as § 19-603.

Sec. to sec. ref. This section is referred to in §§ 18-920, 18-7905, and 19-603.

CHAPTER 80

MOTOR VEHICLES

SECTION.

- 18-8001. Driving without privileges.
- 18-8002. Tests of driver for alcohol concentration, presence of drugs or other intoxicating substances — Suspension upon refusal of tests.
- 18-8002A. Tests of driver for alcohol concentration, presence of drugs or other intoxicating substances — Suspension upon failure of tests.
- 18-8002B. [Repealed.]
- 18-8003. Persons authorized to withdraw blood for the purposes of determining content of alcohol or other intoxicating substances.
- 18-8004. Persons under the influence of alcohol, drugs or any other intoxicating substances.
- 18-8004A. Penalties — Persons under 21

SECTION.

- with less than 0.08 alcohol concentration.
- 18-8004C. Excessive alcohol concentration — Penalties.
- 18-8005. Penalties.
- 18-8006. Aggravated driving while under the influence of alcohol, drugs or any other intoxicating substances.
- 18-8007. Leaving scene of accident resulting in injury or death.
- 18-8008. Ignition interlocks — Electronic monitoring devices.
- 18-8009. Ignition interlocks — Assisting another in starting or operating — Penalty.
- 18-8010. Surcharge added to all fines.
- 18-8011. Stay of suspension of drivers' licenses or driving privileges upon reincarceration.

18-8001. Driving without privileges. — (1) Any person who drives or is in actual physical control of any motor vehicle upon the highways of this state with knowledge or who has received legal notice pursuant to section

49-320, Idaho Code, that his driver's license, driving privileges or permit to drive is revoked, disqualified or suspended in this state or any other jurisdiction is guilty of a misdemeanor.

(2) A person has knowledge that his license, driving privileges or permit to drive is revoked, disqualified or suspended when:

(a) He has actual knowledge of the revocation, disqualification or suspension of his license, driving privileges or permit to drive; or

(b) He has received oral or written notice from a verified, authorized source, that his license, driving privileges or permit to drive was revoked, disqualified or suspended; or

(c) Notice of the suspension, disqualification or revocation of his license, driving privileges or permit to drive was mailed by first class mail to his address pursuant to section 49-320, Idaho Code, as shown in the transportation department records, and he failed to receive the notice or learn of its contents as a result of his own unreasonable, intentional or negligent conduct or his failure to keep the transportation department apprised of his mailing address as required by section 49-320, Idaho Code; or

(d) He has knowledge of, or a reasonable person in his situation exercising reasonable diligence would have knowledge of, the existence of facts or circumstances which, under Idaho law, might have caused the revocation, disqualification or suspension of his license, driving privileges or permit to drive.

(3) Any person who pleads guilty to or is found guilty of a violation of subsection (1) for the first time:

(a) Shall be sentenced to jail for a mandatory minimum period of not less than two (2) days, and may be sentenced to not more than six (6) months, provided however, that in the discretion of the sentencing judge, the judge may authorize the defendant to be assigned to a work release or work detail program within the custody of the county sheriff during the period of incarceration, or, if the underlying suspension that resulted in the violation of this section is not a suspension resulting from an offense identified in subsection (8) of this section, the judge may authorize an equivalent amount of community service in lieu of jail, or any equivalent combination of these options;

(b) May be fined an amount not to exceed five hundred dollars (\$500); and

(c) Shall have his driving privileges suspended by the court for an additional six (6) months following the end of any period of suspension, disqualification or revocation existing at the time of the violation; the defendant may request restricted driving privileges during the period of the suspension or disqualification, which the court may allow if the defendant shows by a preponderance of the evidence that driving privileges are necessary for his employment, education or for family health needs.

(4) Any person who pleads guilty to or is found guilty of a violation of subsection (1) for a second time within five (5) years, irrespective of the form of the judgment(s) or withheld judgment(s):

(a) Shall be sentenced to jail for a mandatory minimum period of not less than twenty (20) days, and may be sentenced to not more than one (1)

year, provided however, that in the discretion of the sentencing judge, the judge may authorize the defendant to be assigned to a work release or work detail program within the custody of the county sheriff during the period of incarceration, or, if the underlying suspension that resulted in the violation of this section is not a suspension resulting from an offense identified in subsection (8) of this section, the judge may authorize an equivalent amount of community service in lieu of jail, or any equivalent combination of these options;

(b) May be fined an amount not to exceed one thousand dollars (\$1,000); and

(c) Shall have his driving privileges suspended by the court for an additional one (1) year following the end of any period of suspension, disqualification or revocation existing at the time of the second violation, during the first thirty (30) days of which time he shall have absolutely no driving privileges of any kind. The defendant may request restricted driving privileges during the period of the suspension or disqualification, to begin after the period of absolute suspension, which the court may allow if the defendant shows by a preponderance of the evidence that driving privileges are necessary for his employment, education or for family health needs.

(5) Any person who has pled guilty to or been found guilty of more than two (2) violations of the provisions of subsection (1) of this section within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), is guilty of a misdemeanor; and

(a) Shall be sentenced to the county jail for a mandatory minimum period of not less than thirty (30) days, and may be sentenced to not more than one (1) year; provided, however, that in the discretion of the sentencing judge, the judge may authorize the defendant to be assigned to a work release or work detail program within the custody of the county sheriff during the period of incarceration, or, if the underlying suspension that resulted in the violation of this section is not a suspension resulting from an offense identified in subsection (8) of this section, the judge may authorize an equivalent amount of community service in lieu of jail, or any equivalent combination of these options;

(b) May be fined an amount not to exceed three thousand dollars (\$3,000); and

(c) Shall have his driving privileges suspended by the court for an additional two (2) years following the end of any period of suspension, disqualification or revocation existing at the time of the violation, during the first ninety (90) days of which time he shall have absolutely no driving privileges of any kind. The defendant may request restricted driving privileges during the period of the suspension or disqualification, to begin after the period of absolute suspension, which the court may allow if the defendant shows by a preponderance of the evidence that driving privileges are necessary for his employment, education or for family health needs.

(6) A minor may be prosecuted for a violation of subsection (1) of this section under chapter 5, title 20, Idaho Code.

(7) If a person is convicted for a violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, and at the time of arrest had no driving privileges, the penalties imposed by this section shall be in addition to any penalties imposed under the provisions of section 18-8005, 18-8004A, 18-8004C or 18-8006, Idaho Code, and not in lieu thereof.

(8) For purposes of this section, the offenses referred to in subsections (3)(a), (4)(a) and (5)(a) of this section are:

- (a) Section 18-1501(3), Idaho Code, transporting a minor in a motor vehicle while under the influence;
- (b) Section 18-4006(3), Idaho Code, vehicular manslaughter;
- (c) Section 18-8001, Idaho Code, driving without privileges;
- (d) Section 18-8004, Idaho Code, driving under the influence of alcohol, drugs or other intoxicating substances;
- (e) Section 18-8004C, Idaho Code, excessive alcohol concentration;
- (f) Section 18-8006, Idaho Code, aggravated driving while under the influence of alcohol, drugs or any other intoxicating substances;
- (g) Section 18-8007, Idaho Code, leaving the scene of an accident resulting in injury or death;
- (h) Section 49-1229, Idaho Code, required motor vehicle insurance;
- (i) Section 49-1232, Idaho Code, certificate or proof of liability insurance to be carried in motor vehicle;
- (j) Section 49-1401, Idaho Code, reckless driving;
- (k) Section 49-1404, Idaho Code, eluding a police officer;
- (l) Section 49-1428, Idaho Code, operating a vehicle without liability insurance; or any substantially conforming foreign criminal violation.

(9) In no event shall a person be granted restricted driving privileges unless the person shows proof of liability insurance or other proof of financial responsibility, as provided in chapter 12, title 49, Idaho Code. [I.C., § 18-8001, as added by 1984, ch. 22, § 2, p. 25; am. 1988, ch. 265, § 563, p. 549; am. 1989, ch. 88, § 59, p. 151; am. 1990, ch. 45, § 42, p. 71; am. 1990, ch. 432, § 9, p. 1198; am. 1992, ch. 115, § 38, p. 345; am. 1994, ch. 148, § 1, p. 336; am. 1998, ch. 110, § 1, p. 375; am. 1998, ch. 325, § 1, p. 1050; am. 2003, ch. 157, § 1, p. 442.]

Compiler's notes. This section was amended by two 1998 acts, ch. 110, § 1, effective July 1, 1998, and ch. 325, § 1, effective July 1, 1998, which do not conflict and have been compiled together.

The 1998 amendment by ch. 110, § 1, inserted "or who has received legal notice pursuant to section 49-320, Idaho Code" in subsection (1), and, in subsection (2)(c), deleted "to his address as shown on the citation which resulted in the suspension, disqualification or revocation, and if such notice was returned it was remailed" following "certified mail", inserted "pursuant to section 49-320, Idaho Code," after "to his address", inserted "transportation" after "shown in the", and inserted "or his failure to keep the transportation department apprised of his mailing address as required by section 49-320, Idaho Code."

The 1998 amendment by ch. 325, § 1, rewrote this section.

Section 58 of S.L. 1989, ch. 88 is compiled as § 11-607.

Section 41 of S.L. 1990, ch. 45 is compiled as § 49-2446.

Section 8 of S.L. 1990, ch. 432 is compiled as § 49-1501.

Section 37 of S.L. 1992, ch. 115 is compiled as § 49-2444.

Section 2 of S.L. 1994, ch. 148 is compiled as § 18-8005.

Section 2 of S.L. 1998, ch. 110 is compiled as § 31-2202.

Section 2 of S.L. 2003, ch. 157 is compiled as § 49-320.

Section 586 of S.L. 1988, ch. 265 provided that the act should take effect on and after January 1, 1989.

Section 47 of S.L. 1990, ch. 45 read: "This act shall be in full force and effect on and after July 1, 1990, with the exception that the provisions within each applicable section of Idaho Code relating to classes of driver's licenses shall take effect no later than September 1, 1990, as determined by the director of the Idaho transportation department, and until that time, existing laws shall remain in effect." Approved March 12, 1990.

Section 10 of S.L. 1990, ch. 432 declared an emergency and provided that this section be in full force and effect on and after April 1, 1990.

Section 2 of S.L. 1998, ch. 325 provided: "The provisions of this act shall apply to violations of section 18-8001, Idaho Code, committed on and after July 1, 1998."

Sec. to sec. ref. This chapter is referred to in § 49-326.

This section is referred to in §§ 40-510 and 49-240.

Cited in: *State v. Zamarripa*, 120 Idaho 751, 819 P.2d 1151 (Ct. App. 1991); *State v. Resendiz-Fortanel*, 131 Idaho 488, 959 P.2d 845 (Ct. App. 1998); *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000); *State v. Anderson*, 134 Idaho 552, 6 P.3d 408 (Ct. App. 2000).

ANALYSIS

Acceptance of plea.

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Knowledge of suspension.

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Same act or omission.

Sentence.

Acceptance of Plea.

Where magistrate did not specifically inquire of defendant pleading guilty to driving without privileges as to the existence of a plea bargain, yet no such agreement existed and defendant was informed of his right to seek a continuance, plead not guilty or guilty and was aware that he may receive the maximum penalty, there was no reversible error in accepting defendant's plea; conviction affirmed. *State v. McCutcheon*, 129 Idaho 168, 922 P.2d 1094 (Ct. App. 1996).

Applicability.

Where defendant's driving privileges were suspended under § 18-1502(d), and he was granted a restricted permit to operate a motor vehicle during the suspension for work or health purposes and later was charged with driving without privileges when he drove for

purposes not covered by the restrictions, he was properly cited for driving without privileges and not under § 49-301 for driving on an invalid license. *State v. Clifford*, 130 Idaho 259, 939 P.2d 578 (Ct. App. 1997).

Evidence Sufficient.

In prosecution for driving without privileges where defendant's license had been suspended and he was given a restricted permit to operate a vehicle for work or health purposes only, where defendant told the sheriff that he was driving to the bowling alley but testified that he was really on way to look for work, where magistrate explained that although the evidence was disputed as to whether defendant told the sheriff he was looking for work, he did not find credible defendant's testimony that he was in fact looking for work and even if he had been his temporary permit did not allow it, and thus there was substantial evidence upon which a reasonable trier of fact could have found that the state had proved the essential elements of the crime of driving without privileges beyond a reasonable doubt. *State v. Clifford*, 130 Idaho 259, 939 P.2d 578 (Ct. App. 1997).

Where the evidence demonstrated that the defendant was stopped while driving a motor vehicle, that he had a suspended driving license, and that he had two prior convictions for driving without privileges within five years, there was sufficient evidence to find that there was probable cause to believe that the defendant had committed the crime of felony driving without privileges. *State v. Hudson*, 133 Idaho 543, 989 P.2d 285 (1999).

Instructions.

Where defendant was arrested for DUI and driving without privileges where she attempted to move a vehicle involved in an accident and in which she had been a passenger, out of the intersection, there was no evidence to support an instruction on "threats or menaces"; an assertion of justification or evidence of justification does not support a requested instruction of "threat or menace." *State v. Eastman*, 122 Idaho 87, 831 P.2d 555 (1992).

Knowledge of Suspension.

Defendant asserted that the state never established that defendant knew his privileges had been suspended, as required in this section. But, the question before the magistrate was not whether there was sufficient evidence to convict defendant, but whether officer had probable cause to arrest. The magistrate found that officer was able to infer at the scene that defendant knew he was driving without privileges. *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992).

Lesser-Included Offenses.

Driving with an invalid license is a lesser-included offense of driving without privileges

under both the statutory and the pleading theories; therefore, where defendant's license was suspended for failing to take care of a citation, a conviction for driving with an invalid license was appropriate where the original charge was driving without privileges. *State v. Matalamaki*, — Idaho —, 79 P.3d 162 (Ct. App. 2003).

Notice.

Where (1) at the request of a judgment creditor the Idaho Department of Transportation sent by certified mail a letter to defendant, stating that the department would suspend his driving privileges 14 days from the date of the letter, and that the suspension would continue until an unsatisfied judgment arising out of an automobile accident was satisfied and he filed with the department proof of financial responsibility, (2) the letter was sent to the address shown on defendant's driver's license, (3) the postman twice left a notice at defendant's address, on two different days, to inform him a certified letter was being held at the post office, but where (4) due to his mother's death, defendant was temporarily away from home and did not pick up his mail, thus leading to the suspension of his driving privileges, defendant overcame the inference of notice created by the mailing procedure employed by the department in attempting to notify him of his license suspension, and there was not sufficient evidence to support a conviction for driving without privileges. *State v. Bird*, 119 Idaho 196, 804 P.2d 925 (Ct. App. 1990).

Prior Convictions.

Where the state was unable to present anything in the record to establish the existence of prior felonies, the state failed to meet its burden of proving the existence of prior convictions, upon which the state relied to enhance a charge of DUI or DWP from a misdemeanor to a felony. *State v. Coby*, 128 Idaho 90, 910 P.2d 762 (1996).

Probable Cause.

Merely because driving without privileges is not included in the list of vehicular offenses in § 49-1405 does not negate an officer's ability to arrest, based on probable cause, for a violation of this section. *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992).

The fact that officer had not personally and directly learned or been notified of defendant's license suspension when he arrested defendant was not dispositive. An officer in the field may rely on information supplied by other officers, and the collective knowledge of police officers involved in the investigation—including dispatch personnel—may support a finding of probable cause. *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992).

Proper Charge.

Where driver's license has been suspended and he had been granted a restricted permit to operate a motor vehicle for certain purposes only and he violates the restrictions, his violation would be operating the vehicle without privilege under this section, not for lack of a valid license; however, when the suspension period ends and the driver takes the necessary steps to have his privileges restored he would hold a valid license, but if his privileges were not restored at the conclusion of the suspension period then he could be cited for violation of § 49-301 for at this point his privileges would not be suspended but he would not have a valid license to drive. *State v. Clifford*, 130 Idaho 259, 939 P.2d 578 (Ct. App. 1997).

Same Act or Omission.

Where the driving without privileges (DWP) prosecution was not dependent upon the nature, quality or manner of defendant's driving, and defendant's status as a suspended licensee driving a vehicle on an Idaho highway was punishable without any requirement that she also be driving erratically, the acts charged, failure to stop and DWP, were separate in character and clear enough in sequence to be distinguishable; therefore, they did not constitute the same act or omission. *State v. Betterton*, 127 Idaho 562, 903 P.2d 151 (Ct. App. 1995).

Since the offense of driving without privileges and the offense of driving without insurance are composed of separate and distinct components, where defendant paid penalty relating to failure to carry proof of insurance, he could still be subject to the punishment for driving without privileges. *State v. Longstreet*, 130 Idaho 202, 938 P.2d 1240 (1997).

Sentence.

Sentences of five years' imprisonment without eligibility for parole for three years for driving while under the influence, and three years' concurrent imprisonment without parole for two years, for driving without privileges were not unduly severe, and the district court did not abuse its discretion in not exercising leniency by reducing the sentences, where numerous attempts had been unsuccessful in deterring defendant from driving while intoxicated. *State v. Garza*, 115 Idaho 32, 764 P.2d 109 (Ct. App. 1988).

Defendant's three-year sentence for the felony of driving while his driving privileges were suspended requiring him to serve the first year in confinement was not excessive where the evidence showed that he had already been convicted three times for the same offense over a period of less than five years and he had an alarming predilection to repeat offenses for which he has often been sen-

tenced. *State v. Scott*, 115 Idaho 432, 767 P.2d 275 (Ct. App. 1989).

Defendant's unified sentence of one year determinate and two years indeterminate for driving without privileges was not excessive in light of the defendant's prior convictions of driving without privileges, and convictions for driving under the influence of alcohol, theft, and writing bad checks; four unsuccessful attempts at probation were also noted, with four violations reported in two years. *State v. Wilcox*, 120 Idaho 139, 814 P.2d 39 (Ct. App. 1991).

Sentence of six months in jail with all but 90 days suspended, a \$500 fine suspended except for court costs, and six months suspension of license was not excessive for first offense of driving without privileges; driver had more than 10 prior traffic violations, two pending charges for driving without privileges and had failed to appear eight times at hearings on those pending charges. *State v. Stewart*, 122 Idaho 284, 833 P.2d 917 (Ct. App. 1992).

18-8002. Tests of driver for alcohol concentration, presence of drugs or other intoxicating substances — Suspension upon refusal of tests. — (1) Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.

(2) Such person shall not have the right to consult with an attorney before submitting to such evidentiary testing.

(3) At the time evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that if he refuses to submit to or if he fails to complete, evidentiary testing:

(a) His driver's license will be seized by the peace officer and a temporary permit will be issued; provided, however, that no peace officer shall issue a temporary permit pursuant to this section to a driver whose driver's license or permit has already been and is suspended or revoked because of previous violations, and in no instance shall a temporary permit be issued to a driver of a commercial vehicle who refuses to submit to or fails to complete an evidentiary test;

(b) He has the right to request a hearing within seven (7) days to show cause why he refused to submit to, or complete evidentiary testing;

(c) If he does not request a hearing or does not prevail at the hearing, his driver's license will be suspended absolutely for one hundred eighty (180) days if this is his first refusal and one (1) year if this is his second refusal within five (5) years; and

(d) After submitting to evidentiary testing he may, when practicable, at his own expense, have additional tests made by a person of his own choosing.

(4) If the motorist refuses to submit to or complete evidentiary testing after the information has been given in accordance with subsection (3) above:

(a) His driver's license or permit shall be seized by the peace officer and forwarded to the court and a temporary permit shall be issued by the

peace officer which allows him to operate a motor vehicle until the date of his hearing, if a hearing is requested, but in no event for more than thirty (30) days; provided, however, that no peace officer shall issue a temporary permit pursuant to this section to a driver whose driver's license or permit has already been and is suspended or revoked because of previous violations and in no instance shall a temporary permit be issued to a driver of a commercial vehicle who refuses to submit to or fails to complete an evidentiary test;

(b) A written request may be made within seven (7) calendar days for a hearing before the court; if requested, the hearing must be held within thirty (30) days of the seizure unless this period is, for good cause shown, extended by the court for one (1) additional thirty (30) day period. The court, in granting such an extension, may, for good cause shown, extend the defendant's temporary driving privileges for one (1) additional thirty (30) day period. The hearing shall be limited to the question of why the defendant did not submit to, or complete, evidentiary testing, and the burden of proof shall be upon the defendant; the court shall suspend all his driving privileges immediately for one hundred eighty (180) days for a first refusal and one (1) year for a second refusal within five (5) years unless it finds that the peace officer did not have legal cause to stop and request him to take the test or that the request violated his civil rights;

(c) If a hearing is not requested by written notice to the court concerned within seven (7) calendar days, upon receipt of a sworn statement by the peace officer of the circumstances of the refusal, the court shall suspend his driving privileges for one hundred eighty (180) days for a first refusal and one (1) year for a second refusal within five (5) years, during which time he shall have absolutely no driving privileges of any kind; and

(d) After submitting to evidentiary testing at the request of the peace officer, he may, when practicable, at his own expense, have additional tests made by a person of his own choosing. The failure or inability to obtain an additional test or tests by a person shall not preclude the admission of results of evidentiary testing for alcohol concentration or for the presence of drugs or other intoxicating substances taken at the direction of the peace officer unless the additional test was denied by the peace officer.

(5) Any suspension of driving privileges under this section or section 18-8002A, Idaho Code, shall be a civil penalty separate and apart from any other suspension imposed for a violation of other Idaho motor vehicle codes or for a conviction of an offense pursuant to this chapter, and may be appealed to the district court.

(6) No hospital, hospital officer, agent, or employee, or health care professional licensed by the state of Idaho, whether or not such person has privileges to practice in the hospital in which a body fluid sample is obtained or an evidentiary test is made, shall incur any civil or criminal liability for any act arising out of administering an evidentiary test for alcohol concentration or for the presence of drugs or other intoxicating substances at the request or order of a peace officer in the manner described in this section and section 18-8002A, Idaho Code: provided, that nothing in this section shall

relieve any such person or legal entity from civil liability arising from the failure to exercise the community standard of care.

(a) This immunity extends to any person who assists any individual to withdraw a blood sample for evidentiary testing at the request or order of a peace officer, which individual is authorized to withdraw a blood sample under the provisions of section 18-8003, Idaho Code, regardless of the location where the blood sample is actually withdrawn.

(b) A peace officer is empowered to order an individual authorized in section 18-8003, Idaho Code, to withdraw a blood sample for evidentiary testing when the peace officer has probable cause to believe that the suspect has committed any of the following offenses:

(i) Aggravated driving under the influence of alcohol, drugs or other intoxicating substance as provided in section 18-8006, Idaho Code;

(ii) Vehicular manslaughter as provided in subsections (3)(a), (b) and (c) of section 18-4006, Idaho Code;

(iii) Aggravated operating of a vessel on the waters of the state while under the influence of alcohol, drugs or other intoxicating substances as provided in section 67-7035, Idaho Code; or

(iv) Any criminal homicide involving a vessel on the waters of the state while under the influence of alcohol, drugs or other intoxicating substances.

(c) Nothing herein shall limit the discretion of the hospital administration to designate the qualified hospital employee responsible to withdraw the blood sample.

(d) The law enforcement agency that requests or orders withdrawal of the blood sample shall pay the reasonable costs to withdraw such blood sample, perform laboratory analysis, preserve evidentiary test results, and testify in judicial proceedings.

(e) The withdrawal of the blood sample may be delayed or terminated if:

(i) In the reasonable judgment of the hospital personnel withdrawal of the blood sample may result in serious bodily injury to hospital personnel or other patients; or

(ii) The licensed health care professional treating the suspect believes the withdrawal of the blood sample is contraindicated because of the medical condition of the suspect or other patients.

(7) "Actual physical control" as used in this section and section 18-8002A, Idaho Code, shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

(8) Any written notice required by this section shall be effective upon mailing.

(9) For the purposes of this section and section 18-8002A, Idaho Code, "evidentiary testing" shall mean a procedure or test or series of procedures or tests, including the additional test authorized in subsection (10) of this section, utilized to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in a person.

(10) A person who submits to a breath test for alcohol concentration, as defined in subsection (4) of section 18-8004, Idaho Code, may also be requested to submit to a second evidentiary test of blood or urine for the

purpose of determining the presence of drugs or other intoxicating substances if the peace officer has reasonable cause to believe that a person was driving under the influence of any drug or intoxicating substance or the combined influence of alcohol and any drug or intoxicating substance. The peace officer shall state in his or her report the facts upon which that belief is based. [I.C., § 18-8002, as added by 1984, ch. 22, § 2, p. 25; am. 1987, ch. 122, § 1, p. 247; am. 1987, ch. 132, § 1, p. 262; am. 1987, ch. 220, § 2, p. 469; am. 1989, ch. 88, § 60, p. 151; am. 1989, ch. 366, § 1, p. 915; am. 1989, ch. 367, § 1, p. 920; am. 1990, ch. 45, § 43, p. 67; am. 1992, ch. 115, § 39, p. 345; am. 1992, ch. 133, § 1, p. 416; am. 1993, ch. 413, § 1, p. 1515.]

Legislative Intent. Section 1 of S.L. 1987, ch. 220 read: "It is the intent of the Legislature that any suspension of a driver's license under the provisions of section 18-8002, Idaho Code, be separate and apart from any other suspension of a driver's license imposed by a conviction under the provisions of chapter 80, title 18, Idaho Code, or any other Idaho motor vehicle law. A suspension under section 18-8002, Idaho Code, which is a civil penalty, is for the refusal to take the test for blood-alcohol concentration and not a portion of any sentence for the underlying offense of driving under the influence of alcohol, drugs or other intoxicating substances."

Compiler's notes. Section 2 of S.L. 1987, ch. 122 is compiled as § 18-8004.

Section 2 of S.L. 1989, ch. 366 is compiled as § 18-8005.

Section 61 of S.L. 1989, ch. 88 is compiled as § 18-8004.

Section 44 of S.L. 1990, ch. 45 is compiled as § 18-8004.

Section 40 of S.L. 1992, ch. 115 is compiled as § 18-8005.

Section 3 of S.L. 1987, ch. 220 declared an emergency. Approved March 31, 1987.

Section 47 of S.L. 1990, ch. 45 read: "This act shall be in full force and effect on and after July 1, 1990, with the exception that the provisions within each applicable section of Idaho Code relating to classes of driver's licenses shall take effect no later than September 1, 1990, as determined by the director of the Idaho transportation department, and until that time, existing laws shall remain in effect." Approved March 12, 1990.

Section 4 of S.L. 1993, ch. 413 read: "Section 3 of this act shall be in full force and effect on and after July 1, 1993. The remaining sections of this act shall be in full force and effect on and after July 1, 1994.

Sec. to sec. ref. This section is referred to in §§ 49-328, 49-335, 67-5101, 67-7034 and 67-7037.

Cited in: State v. Knoll, 110 Idaho 678, 718 P.2d 589 (Ct. App. 1986); State v. Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App. 1988); State v. Cheney, 116 Idaho 917, 782 P.2d 40

(Ct. App. 1989); State v. Bacon, 117 Idaho 679, 791 P.2d 429 (1990); State v. Madden, 127 Idaho 894, 908 P.2d 587 (Ct. App. 1995); Quinlan v. Idaho Comm'n for Pardons & Pardon, 138 Idaho 726, 69 P.3d 146 (2003).

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Actual Physical Control.

Where defendant was found sitting in the driver's seat behind the steering wheel with the engine running and the lights on, he was in "actual physical control" of the vehicle as defined by subsection (7) of this section. *State v. Clayton*, 113 Idaho 817, 748 P.2d 401 (1988).

Advisory Form.

This section makes no provision that each individual be allowed the opportunity to personally read the advisory form. *Claiborne v. State*, 125 Idaho 660, 873 P.2d 914 (Ct. App. 1994).

Two paragraphs of city's standard advisory form were inconsistent with and did not properly advise motorist of his rights and duties under this section. One paragraph was ambiguous and could be reasonably read in manner contradicting the statute, i.e., that persons holding certain classes of commercial driver's licenses will not have their licenses seized or be granted temporary permits; the other's use of the phrase "explain why" communicated a lower burden of proof than the phrase "show cause" used in this section. *Virgil v. State*, 126 Idaho 946, 895 P.2d 182 (Ct. App. 1995).

Defendant's license suspension could not be upheld where defendant was read the correct information listed in subsection (3) of this section, but was incorrectly advised that if he took and failed the test he would have his license automatically suspended for a period of ninety days or one year. This latter information was part of § 18-8002A, a statute that was not in effect at the time defendant was requested to submit to the BAC, and the additional erroneous information caused the advisory form read to defendant to not meet the requirements of the law in effect at the time. *Head v. State*, 136 Idaho 409, 34 P.3d 1092 (Ct. App. 2000).

Applicability to Indian Reservations.

The state, clearly having the jurisdiction and responsibility for enforcement and punishment of criminal offenses relating to the operation of motor vehicles upon the highways and roads maintained by the state and its political subdivisions within the bound-

aries of Indian reservations, also has jurisdiction to enforce the provisions of this section for the same reasons; the implied consent law of this section is ancillary to, and in aid of, the state's policy of enforcing its driving under the influence laws, and is specifically intended by the legislature to supplement the enforcement of its policy to protect the driving public and to enforce the safe operation of motor vehicles upon the highways and roads of the state, including those that are located in or upon Indian reservations. *State v. McCormack*, 117 Idaho 1009, 793 P.2d 682 (1990).

Balancing of Interests.

Even though a licensee's interest in maintaining his or her license for employment purposes is substantial, it must be subordinated to the state's interest in preventing intoxicated persons from driving on Idaho's highways, especially where the individual is entitled to postsuspension review procedures. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Constitutionality.

This section was enacted to discourage the intoxicated driver from attempting to operate a motor vehicle and as such constitutes a proper exercise of the police power. *State v. Clayton*, 113 Idaho 817, 748 P.2d 401 (1988).

Construction With Other Statutes.

In the case of a failure of evidentiary testing, rather than a refusal to take the test, the legislature has chosen to provide that the separate civil and criminal suspensions shall run concurrently unless the criminal court states otherwise; however, no such preference for concurrent suspensions is afforded in the event of a refusal to submit to evidentiary testing, and where defendant refused to submit to a blood test, he was not eligible for any benefit under § 18-8002A. *Halen v. State*, — Idaho —, — P.3d —, 2000 Ida. App. LEXIS 81 (Ct. App. Oct. 12, 2000).

Consultation with Counsel.

A licensee required to submit to a blood alcohol concentration test under the implied consent statute has no constitutional right to consult with counsel prior to taking that test; license suspension under the implied consent statute is intended as a civil, rather than a criminal, penalty for failure to submit to an evidentiary BAC test, and under the implied consent statute anyone who accepts the privilege of operating a motor vehicle upon Idaho's highways has consented in advance to submit to a BAC test without the right to consult with counsel. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Defendant had no right to counsel before deciding to submit to a blood alcohol concen-

tration test. Section 19-515 provides a person who is arrested with the right to visit with an attorney upon request; however, nothing in its language implies that the arrested person's right to counsel should be extended beyond any safeguard provided under the sixth amendment securing an accused's right to counsel during critical stages of a criminal proceeding; this protection does not extend to investigatory proceedings. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

The legislative scheme of subsection (2) of this section — prohibiting a licensee from consulting with counsel before submitting to a blood alcohol concentration test — is rationally related to a legitimate government interest, and although it might be advantageous for a licensee to consult with an attorney prior to submitting to a BAC test, there appears to be no reason to abrogate the legislature's authority to deny this right in order to advance its objective to provide for safer highways; accordingly, defendant's substantive due process rights were not violated by refusing him the right to consult with counsel at the time he was asked to submit to a BAC test. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

An alcohol concentration test is outside the scope of a "criminal prosecution" for the purpose of Const., Article 1, § 13. *Triplett v. State*, 119 Idaho 193, 804 P.2d 922 (Ct. App. 1991).

A motorist does not have a right to consult counsel before taking a blood-alcohol test. *State v. Burris*, 125 Idaho 289, 869 P.2d 1384 (Ct. App. 1994).

Delayed Assent.

If a motorist, having initially declined to take a blood-alcohol test, reconsiders and gives a timely and unequivocal assent, he cannot be deemed to have "refused" the test under this section. *Smith v. State*, 115 Idaho 808, 770 P.2d 817 (Ct. App. 1989).

A delayed assent to take a blood-alcohol test will be deemed timely only if it is given while the motorist is still in police custody, if it is given when testing equipment and personnel are readily available, and if the delay produced by the initial declination would not cause the outcome of the test to be materially affected. *Smith v. State*, 115 Idaho 808, 770 P.2d 817 (Ct. App. 1989).

The burden of proving that a delayed assent to a blood-alcohol test was timely rests upon the motorist. *Smith v. State*, 115 Idaho 808, 770 P.2d 817 (Ct. App. 1989).

Motorist who initially refused to submit to evidentiary test, but some forty minutes after such refusal consented to such testing, had the burden of proving that the delay in taking the test did not cause the outcome of the test to be materially affected. *Pangburn v. State*, 124 Idaho 139, 857 P.2d 618 (1993).

Double Jeopardy.

The prosecution for driving under the influence (DUI) was not barred by the double jeopardy component of the Fifth Amendment of the United States Constitution or by § 18-301 (now repealed) as the administrative suspension of defendant's license did not foreclose subsequent punishment for the DUI charge arising out of the same incident. *State v. Talavera*, 127 Idaho 700, 905 P.2d 633 (1995).

Due Process.

The destruction of the blood samples after blood alcohol testing was done by trained technicians at an independent hospital did not result in a deprivation of due process under the United States Constitution, where there was no indication that the destruction of the blood samples represented a calculated effort by law enforcement personnel to circumvent disclosure requirements, the defendants did not establish that the blood samples, if available, would have played a significant role in their defense, and the defendants could have had their own blood tests run pursuant to subsection (2) of § 18-8003. *State v. Albright*, 110 Idaho 748, 718 P.2d 1186 (1986).

The implied consent statute did not violate DUI suspect's due process rights by not specifying that he would be required to carry the burden of proof at his show cause hearing. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

There was no due process violation due to the fact that individual suspected of DUI was not offered the blood alcohol concentration test of his choice; it is not the licensee who can choose the BAC test to be given; however, the licensee has the opportunity to test the sufficiency of the original test results, and avoid the consequences of an erroneous deprivation of his or her driving privileges. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

The police officers' denial of defendant's request to phone her attorney, after having been arrested for driving while under influence (DUI) and having been given an evidentiary blood-alcohol content (BAC) test, constituted a due process violation, in that she was prevented from contacting someone who could facilitate the administration of an independent BAC test and other exculpatory evidence which could be used to challenge the State's evidence with minimal fiscal and administrative burden upon the State. *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Ct. App. 1995).

Where the police officers, who denied defendant's request to phone her attorney after having been arrested for driving while under

influence (DUI), contended that their impropriety was harmless since it was speculative that the results of an independent blood test would provide exculpatory evidence, considering that the initially administered breath test revealed a blood-alcohol content (BAC) of .20 and .21, the appellate court concluded that this section clearly contemplates the rights of those who are arrested for DUI to obtain an independent test, and denying their opportunity to do so, is in violation of this section and of their due process rights. *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Ct. App. 1995).

Defendant's due process rights were not infringed by police officer disposing of informed consent advisory form, on which defendant had indicated his initial refusal of the test, but subsequent to which, defendant submitted to the test. *State v. Harmon*, 131 Idaho 80, 952 P.2d 402 (Ct. App. 1998).

Equal Protection.

This section's prohibition against licensee-attorney contact prior to taking a blood alcohol concentration test is rationally related to the legitimate government interest of obtaining expedient and accurate blood alcohol concentration test results, thereby increasing the likelihood of detecting drunk drivers; thus, the rational basis test was satisfied, and that none of licensee's equal protection rights were violated where he was denied his right to counsel at the time he refused a BAC test. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

With regard to those individuals deprived of a right to counsel when asked to submit to a blood alcohol concentration test under the implied consent statute, this group does not represent a suspect class, nor are there any fundamental interests involved; the classes and interests are those affected by social and economic legislation, and under these circumstances, the standard to be employed is one of rational basis, requiring only that the statutory scheme be related to some legitimate government purpose. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Factual Determination by Magistrate.

Magistrate presiding over a driver's license suspension hearing was entitled to make a factual determination as to probable cause from uncontradicted testimony of investigating officer, and to disregard other testimony by the officer concerning the justification for the stop. *Justice v. State*, 119 Idaho 158, 804 P.2d 331 (Ct. App. 1990).

Failure to Advise of Rights.

Where probable cause existed for the taking and testing of blood, and the evidentiary test was conducted in a reasonable manner, the results of the evidentiary test should be admissible in a criminal prosecution regardless

of whether or not the investigating officer complied with the provisions of subsection (3) of this section. *State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989).

Intermediate appellate decision of the district court reversing an order of the magistrate granting the driver's motion to set aside the magistrate's previous order suspending his driver's license, was proper where, assuming the general applicability of the Idaho Rules of Civil Procedure to license suspension proceedings by virtue of I.M.C.R. 9.2(e), a conflict remained between I.M.C.R. 9.2(b) and I.R.C.P. 60(b)(1); because I.M.C.R. 9.2(b) was the more specific rule, it controlled over the more general I.R.C.P. 60(b)(1) and therefore, I.R.C.P. 60(b)(1) was not available to remedy the driver's untimely request for a show cause hearing. *Hansen v. State* (In re Hansen), 138 Idaho 865, 71 P.3d 464 (Ct. App. 2003).

Failure to Offer Test.

Due process requires only that the police give a person accused of driving under the influence a "reasonable opportunity to attempt to procure a timely sample," through his own efforts and at his own expense; where the defendant offered to take a test if she could be released, but did not request the opportunity to obtain her own test. The refusal of the police to give her a test on demand did not infringe upon her right to due process. *State v. Hayes*, 108 Idaho 556, 700 P.2d 959 (Ct. App. 1985).

Where the defendant failed an alphabet test and physical dexterity test administered by the arresting officers at the time and place of the arrest; where she was not offered a blood alcohol test at that time because on one or two previous occasions she had been unable to blow up the balloon, which is an indispensable requirement of the test; and where finally, sometime after she was transported to jail, she indicated she would take a test if she could be released from jail, the failure or refusal to administer a test under these circumstances was not "arbitrary" in violation of the equal protection clause. *State v. Hayes*, 108 Idaho 556, 700 P.2d 959 (Ct. App. 1985).

Magistrate erred in concluding evidence of defendant's blood alcohol test result should have been suppressed because arresting officer did not provide defendant with an opportunity for an additional test since facts showed defendant requested only an alternative test, not an additional test. *State v. Cunningham*, 116 Idaho 179, 774 P.2d 349 (Ct. App.), cert. denied, 117 Idaho 523, 789 P.2d 519 (1989).

Subsection (4)(d) of this section does not require the suppression of the results of the state's BAC test whenever a police officer fails to inform the licensee of his rights under

subsection (3)(d), it only requires such suppression when the officer denies the additional test; thus, where defendant was advised by his attorney to request an additional BAC test, officer's failure to inform defendant of his rights under 18-8002(3)(d) did not constitute a denial of his statutory right to an additional BAC test. Magistrate did not err in refusing to suppress the results of the state's BAC test on that basis. *State v. Rountree*, 129 Idaho 146, 922 P.2d 1072 (Ct. App. 1996).

Where defendant simply told deputy who was not qualified to administer a breath test that he wanted a breathalyzer test and did not request that the officers facilitate his own arrangements for a second test, such conduct did not constitute a denial of defendant's right to a second test as this section does not require the state to administer the second BAC test when requested to do so; the state must do more than simply fail to administer a second test in order for that failure to constitute a denial under subsection (4)(d) of this section. *State v. Rountree*, 129 Idaho 146, 922 P.2d 1072 (Ct. App. 1996).

Hearing.

Where the defendant had already been granted one continuance of the license suspension hearing, the motion for a second continuance was not made until the outset of the hearing, and the defendant was unavailable because of business reasons, there was no abuse of discretion in the magistrate's decision to refuse a second continuance. *Heth v. State*, 114 Idaho 893, 761 P.2d 1245 (Ct. App. 1988) (decision prior to 1987 amendment).

The only inquiry before the judge in a driver's license suspension hearing under this section is whether the person is in the "driver's position" of a vehicle with the motor running or with the vehicle moving. *Vogt v. State*, 117 Idaho 545, 789 P.2d 1136 (1990).

From the State's perspective, a license suspension (BAC) hearing is a minor matter where one would not expect the State to prosecute the action vigorously; thus collateral estoppel should not apply to the issues decided at the hearing. The State, although it initiates the suspension, has little or no incentive to vigorously litigate the license suspension because it is a civil matter pursued by the driver. The driver's license can be suspended without the State doing anything more than filing the affidavit if the driver is unable to convince the court there was cause to refuse the evidentiary test. Allowing issues decided at a BAC hearing to preclude issues from being litigated at a criminal DUI trial would effectively turn the hearing into a criminal matter, as the state would be forced to anticipate possible defenses and litigate aggressively at the BAC hearing to prevent

issue preclusion in any future criminal matter. *State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994).

—Burden of Proof.

At a driver's license suspension hearing, defendant had the burden of showing why he did not submit to the breathalyzer test. *Justice v. State*, 119 Idaho 158, 804 P.2d 331 (Ct. App. 1990).

—Effect Upon Criminal Prosecution.

Issues decided at a license suspension (BAC) hearing were not entitled to preclusive effect in criminal prosecution based upon either the doctrine of res judicata or collateral estoppel. *State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994).

—Timeliness.

Magistrate did not lose jurisdiction over a driver's license suspension hearing by her failure to timely hold a hearing to determine whether good cause existed for defendant's refusal to submit to a blood alcohol test; the issue of timeliness was not preserved as a viable issue on appeal. See *Von Krosigk v. State*, 116 Idaho 520, 777 P.2d 742 (Ct. App. 1989).

Implied Consent.

Since defendant, convicted of aggravated driving under the influence, had impliedly consented to the blood alcohol test pursuant to subdivision (1) of this section, the state was not required to demonstrate that the search was justified by exigent circumstances; lower court's order denying defendant's motion to suppress results of blood alcohol test was affirmed. *State v. Rodriguez*, 128 Idaho 521, 915 P.2d 1379 (Ct. App. 1996).

Statement made by arresting officer to defendant, who had refused to take breathalyzer test, that it would be in defendant's "best interest" to take the test, did not render defendant's statutorily implied consent to the test ineffective for Fourth Amendment purposes. *State v. Harmon*, 131 Idaho 80, 952 P.2d 402 (Ct. App. 1998).

By implying consent, this statute removes the right of a driver to refuse an evidentiary test for blood alcohol concentration. *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (Ct. App. 1999).

Inability to Complete Test.

By telling officer she was doing the best she could and blowing all the air she had, appellant sufficiently articulated a physical inability to complete the task so as to put the officer on notice that a different test should be utilized. It was not essential that she give the officer a medical diagnosis for her physical condition. *Helfrich v. State*, 131 Idaho 349, 955 P.2d 1128 (Ct. App. 1998).

Independent Test.

—Failure to Request.

Where defendant after submitting to the BAC test and having the standard § 18-8002 Advisory Form read to him failed to assert his right to an independent BAC test, his constitutional right to procedural process was not violated by his not having been given access to a phone, since such access at this point in the detention is the mechanism through which a DUI detainee executes his right to a second test and once the request for the second test is made the state may not interfere with or deny access to a telephone to arrange for such a test, but if no request is made access to a phone is not necessary. *State v. Shelton*, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

—Failure to Request.

Where defendant did not affirmatively ask for an independent blood alcohol concentration test and refused an offer from the police to use the phone after his arrest, a showing that his son and attorney were at the jail to bond him out and that there was an unexplained delay in his release was insufficient to inform jail personnel that defendant wished to exercise his right to obtain an independent test. *State v. Cantrell*, — Idaho —, 80 P.3d 345 (Ct. App. 2003).

Instructions.

Instruction informing the jury that defendant had no right to refuse to submit to a Blood Alcohol Concentration test was proper, despite defendant's contention that this language amounted to evidence of prior bad acts prohibited by IRE 404(b) and that it raised an inference that defendant was guilty of other offenses, thereby prejudicing him. *State v. Tate*, 122 Idaho 366, 834 P.2d 883 (Ct. App. 1992).

Intent.

The State is not required to prove that a person had any intent to drive in the context of a driver's license suspension hearing under this section. *Vogt v. State*, 117 Idaho 545, 789 P.2d 1136 (1990).

Jurisdiction of Court.

The magistrate court erred in summarily terminating a driver's license suspension proceeding and returning the license to a driver on the ground that the court did not have jurisdiction to proceed on the basis of fact that the affidavit filed by the officer was invalid; with both jurisdiction over the subject matter and personal jurisdiction over the parties, the magistrate court erred when it concluded that "the court does not have jurisdiction to proceed." *Hanson v. State*, 121 Idaho 507, 826 P.2d 468 (1992).

Legal Cause.

Officer's observation that defendant activated her right-hand turn signal and then failed to make a turn at three consecutive intersections provided him with "legal cause" to stop her based on his reasonable and articulable suspicion she was engaged in inattentive driving. *Deen v. State*, 131 Idaho 958, 958 P.2d 592 (1998).

Legislative Intent.

The legislature acknowledged that some individuals refuse to comply with their previously granted consent to submit to an evidentiary test, and rather than condone a physical conflict, the legislature provided for the administrative revocation of the license of an individual who refuses to comply with his previously given consent; such legislative acknowledgment, however, was not meant to hamstring the ability of law enforcement to properly investigate and obtain evidence of serious crimes committed by those individuals who have chosen to drink and then drive. *State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989).

The clear legislative intent behind the license suspension scheme is to determine the status of driving privileges as swiftly as possible after a test is refused. *Cummings v. State*, 118 Idaho 800, 800 P.2d 687 (Ct. App. 1990).

As a matter of law, a driver's consent to take a required evidentiary test must be unconditional and based on the strong state interest in protecting the public from drunk drivers and from the plain language of the statute, it is evident that the legislature presumed a driver's consent to take an evidentiary test to be unconditional; therefore, even if the defendant's request is reasonable, the defendant cannot condition submission to an evidentiary test on the jailer's compliance with the request. *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

Pleadings.

Since the suspension of driving privileges under this section is a "civil penalty," the more liberal pleading rules of the Idaho Rules of Civil Procedure are applicable to the proceedings; nothing in the Idaho Rules of Civil Procedure or in subsection (4)(c) of this section requires an affidavit as a statutory condition precedent to the court conducting and concluding a hearing where a written request has been made by the driver whose license has been seized. *Hanson v. State*, 121 Idaho 507, 826 P.2d 468 (1992).

Police Roadblock.

Because the evidence used to convict the defendant of driving under the influence was unconstitutionally obtained pursuant to a warrantless search, prior to which the police

lacked individualized suspicion of criminal wrongdoing and authority to establish a roadblock, the magistrate erred in denying the defendant's motion to suppress. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

A police roadblock designed to detect and deter drunk driving is not constitutionally permissible where the police have failed to obtain a judicial warrant, have no probable cause to believe the automobile driver is engaged in criminal wrongdoing, and lack legislative authority to establish a roadblock. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

Probable Cause.

Where police officer, after stopping defendant's automobile, noticed that defendant's eyes were glazed and bloodshot, his speech was slightly slurred and his breath smelled of alcohol, and where the officer also noted that defendant had a tail light out, crossed the fog line twice, and admitted to have had three beers to drink, these facts established probable cause to arrest defendant and to request that he submit to a blood-alcohol test. *State v. Armbruster*, 117 Idaho 19, 784 P.2d 349 (Ct. App. 1989).

Police officer had probable cause to request driver to take a breath alcohol test after she had admitted at the hospital to drinking some wine before driving. *State v. Cooper*, 119 Idaho 654, 809 P.2d 515 (Ct. App. 1991).

Officer had probable cause to request motorist to submit to an alcohol test where officer found motorist at the scene of an accident, where motorist had a head injury that matched damage to vehicle's windshield, and where motorist was thick-tongued and had trouble keeping his balance and admitted to drinking but denied driving the vehicle. *Gifford v. State*, 123 Idaho 558, 850 P.2d 207 (Ct. App. 1993).

Where defendant was not aware of officer's overhead lights until defendant backed into the patrol car, and where officer then smelled alcohol on defendant's breath, administered field sobriety tests, and defendant refused a breath test, defendant was not "seized" at the time overhead lights were turned on, and probable cause existed for arrest after accident. *Mackey v. Mackey*, 124 Idaho 585, 861 P.2d 1250 (Ct. App. 1993).

Purpose.

The purpose of this section is to provide an incentive for motorists to cooperate in determining levels of blood-alcohol content by a reasonably precise scientific method. *State v. Breed*, 111 Idaho 497, 725 P.2d 202 (Ct. App. 1986).

This section is devoted entirely to the administrative, or civil, suspension of the license of a driver, and does not in any way

discuss criminal offenses related to driving under the influence of alcohol; rather, it sets forth the administrative procedures the legislature established in its attempt to restrict or control the use of the highways by those persons who cannot or will not conform their actions to the accepted standards of civilized behavior. *State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989).

This section is a prophylactic rule which is intended to discourage intoxicated persons from entering motor vehicles except as passengers; it is no matter how unusual the circumstances leading to the placement of an intoxicated person in the driver's position of a vehicle with the motor running—once there, this section is brought into operation. *Vogt v. State*, 117 Idaho 545, 789 P.2d 1136 (1990).

Reasonable Grounds.

Defendant's own evidence that he had been drinking and that he smelled of alcohol, together with the observations of the officer of defendant's conduct, including the failure to stop at the stop sign, provided the officer with the requisite "reasonable grounds" to demand that he take the alcohol concentration test; defendant's explanation that he was on medication which he felt might affect the test results, and his other witnesses who testified that he was not intoxicated could not remove the "reasonable grounds." *State v. Tierney*, 109 Idaho 474, 708 P.2d 879 (1985).

Where the officer testified that he smelled alcohol on defendant's breath, that defendant's eyes were glassy, and that defendant failed all of the field dexterity tests, and the officer had the benefit of another officer's observations and assessments regarding defendant's driving and level of intoxication, probable cause or reasonable grounds were established under this section. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Where, in a show cause hearing for return of an operator's license, the record showed that the defendant's vehicle was traveling at excessive speed on a public highway, upon stopping the vehicle, the arresting officer smelled alcohol on the defendant's breath, her eyes were bloodshot, she failed all of the field dexterity tests and she admitted to the officer that she had been drinking, these facts established probable cause or reasonable grounds under this section for the officer to request that the defendant take the blood-alcohol test. *Nowoj v. State*, 115 Idaho 34, 764 P.2d 111 (Ct. App. 1988).

Where the state placed in evidence at the administrative hearing the incident report prepared by the arresting officer and records pertaining to the citizen's telephone call which showed that the citizen identified herself and gave her address, that she complained of an "unwanted" intoxicated person

at a specified address, and that the intoxicated person had left in a described pickup headed in a particular direction, the evidence was sufficient to show reasonable suspicion for the stop. *Wilson v. Idaho Transp. Dep't*, 136 Idaho 270, 32 P.3d 164 (Ct. App. 2001).

Refusal to Take Test.

A demonstrated physical inability to perform the requested test would be sufficient cause for refusal of the test. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

A fear of needles may establish sufficient cause for refusing to submit to a blood test requested pursuant to this section if the fear is of such a magnitude that as a practical matter the defendant is psychologically unable to submit to the test, and if the fear is sufficiently articulated to the police officer at the time of refusal so that the officer is given an opportunity to request a different test. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

A defendant may prevail at a hearing under this section by showing "cause" for his or her refusal of a sufficient magnitude that it may be fairly said that a suspension of the license would be unjust or inequitable. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Where the defendant was requested to submit to a blood test and he refused, his conduct was a refusal, regardless of whether he expressed a genuine desire to submit to a breath or urine test. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Although under subsection (3) of this section a driver has the physical ability to refuse to submit to an evidentiary test, that section did not create a statutory right in a driver to withdraw his implied consent or to refuse to submit to an evidentiary test to determine his blood alcohol level. *State v. McCormack*, 117 Idaho 1009, 793 P.2d 682 (1990).

Conduct of defendant stopped for driving under the influence constituted a refusal to submit to a test where, although he did not trust the accuracy of the Intoximeter and offered to have a blood alcohol test drawn at his own expense if the investigating officer would take him to the hospital, the choice of which alcohol concentration test will be given rests with the police officer, and defendant could have taken the Intoximeter test as the officer requested and still have had a blood test administered at his own expense. *Cummings v. State*, 118 Idaho 800, 800 P.2d 687 (Ct. App. 1990).

Where defendant agreed to take a breathalyzer test only on the condition that the police administering the test remove his handcuffs and the police refused and defendant did not take the test, defendant's conditional consent to take a test to determine blood alcohol content was considered to be a

refusal for the purpose of determining whether his driver's license should be revoked under subsection (4) of this section. *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

—Burden of Proof for Showing Cause.

Defendant did not show that he was physically unable to take the test and the state presented uncontroverted evidence that being handcuffed does not render a person physically incapable of taking a breathalyzer test; therefore, the burden of proof rested on the defendant to prove physical inability to take the test or to establish another cause of sufficient magnitude to refuse to take the test. *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

The burden of proving a cause of sufficient magnitude for refusing to take a breathalyzer is on the defendant; physical inability to take the test is a sufficient "cause" under this section. *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

—Failure to Offer Affidavit of Refusal.

Where the transcript of a "breath-alcohol test refusal" hearing showed that the parties and the court understood the issue in the case to be whether the officer had probable cause to stop defendant based on observations the officer had made regarding defendant's driving, and where defendant's refusal to take the test was never questioned, there was no reversible error, nor even a properly preserved claim of error, flowing from the failure to put affidavit of refusal into evidence. *Clayton v. State*, 118 Idaho 59, 794 P.2d 648 (Ct. App. 1990).

—Improperly Informed of Consequences.

Driver suspected of driving under the influence had the right to be correctly advised by the officer of the true consequences of refusing to take the blood alcohol test, i.e., that his license would be suspended for 180 days, and where that advice was not given, the state failed to comply with the statute governing suspension of licenses for failure to submit to a chemical test, and the district court correctly held that defendant's license could not be suspended even though he refused to submit to a chemical test. *Beem v. State*, 119 Idaho 289, 805 P.2d 495 (Ct. App. 1991).

—No Statutory Right to Refuse.

The legislature has not created a statutory right to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. *State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989).

The requirement contained in subsection (3) that a motorist suspected of driving while under the influence be advised of the conse-

quences of refusal did not create a right to refuse the test or to withdraw consent. *State v. Burris*, 125 Idaho 289, 869 P.2d 1384 (Ct. App. 1994).

Court did not err in denying defendant's motion to suppress blood alcohol test results after he caused a fatal accident and where he revoked his consent, because the state had a compelling interest to protect citizens from drunk drivers. *State v. Cooper*, 136 Idaho 697, 39 P.3d 637 (Ct. App. 2001).

Individual's expressed fear of needles was not sufficient grounds for refusing to submit to a police officer's request for a blood alcohol concentration test where the individual failed to articulate a psychological inability to submit to the test. *Halen v. State*, 136 Idaho 829, 41 P.3d 257 (2002).

Driver's driving privileges were properly suspended where the driver refused to submit to a blood test because the driver wanted an attorney present, and the driver had no right to have counsel present, or to consult counsel before the test. *Head v. State*, 137 Idaho 1, 43 P.3d 760 (2002).

—Properly Informed of Consequences.

Where the defendant was taken to the police department and the officer read the standard consent form to defendant which included all of the information required by subsection (3) of this section, and after hearing this, defendant was asked whether he would submit to an evidentiary test and defendant refused, the defendant was properly advised regarding the refusal to submit to a requested blood-alcohol test. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Section 18-8002 set forth a list of matters about which a person had to be advised when evidentiary testing was requested, including the consequences of refusal of a breath test; however, the legislature had not deemed it necessary to include the consequences that will follow if a person submitted to and passed the breath test. *Thompson v. State* (In re Thompson), 138 Idaho 512, 65 P.3d 534 (Ct. App. 2003).

Request for Test by Defendant.

Where in prosecution for driving under the influence defendant requested that he be allowed to obtain a blood test and the police officer told him that he would have to wait until after the officer was finished booking him, and when officer finished and offered to take defendant for test, defendant declined and indicated that he did not feel well and wanted to go home, in essence defendant withdrew his request for the test, and it was because of this that no test was obtained and thus magistrate properly concluded there was no basis for suppressing the test results or dismissing the charges. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

Request For Test By Officer.

An officer's authority to require a defendant to submit to a blood withdrawal does not turn on whether aggravating factors are present. *Halen v. State*, 136 Idaho 829, 41 P.3d 257 (2002).

Revocation of Probation.

Where the defendant's criminal history of defendant charged with violating probation granted in conjunction with a felony conviction for driving under the influence was replete with driving violations involving alcohol, and given the fact that although on more than one occasion the defendant had attempted to treat his alcohol problem, he had failed to complete the treatment programs ordered by the court, and since it is entirely within the discretion of the trial court to determine that if rehabilitation measures undertaken during probation fail, and if such measures should be shifted to the more structured setting of a custodial facility, the district court did not abuse its sentencing discretion by revoking probation and imposing one of incarceration. *State v. Johnson*, 119 Idaho 107, 803 P.2d 1013 (Ct. App. 1991).

Right to Counsel.

Where a DUI defendant after submitting to a BAC test and being advised of his right to an independent test did not avail himself of this right, since there is not a constitutional right to counsel prior to or at the time of the police's evidentiary BAC test and since § 19-853 does not enlarge this constitutional right because the period of time at issue does not constitute a "critical stage" in a criminal proceeding, defendant's right to counsel was not violated inasmuch as he was advised of this right at his arraignment. *State v. Shelton*, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

There is no constitutional right to counsel prior to or at the time of the police's evidentiary BAC test. *State v. Shelton*, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

Defendant had no Sixth Amendment right to counsel during period between his initial refusal of test and his ultimate decision to submit to the procedure. *State v. Harmon*, 131 Idaho 80, 952 P.2d 402 (Ct. App. 1998).

Search and Seizure.

Because the temporary permit issued under this section which defendant handed the officer was not official identification and would not allow him to drive upon the public highways because it was expired, the possession of the expired permit by the officer did not prevent defendant from leaving and no Fourth Amendment seizure of defendant's person occurred. *State v. Nickel*, 134 Idaho 610, 7 P.3d 219 (2000).

Self-Incrimination.

Defendant's Fifth Amendment right against self-incrimination was not infringed

by absence of Miranda warnings before he took test. *State v. Harmon*, 131 Idaho 80, 952 P.2d 402 (Ct. App. 1998).

Test.

— Purpose.

The purpose of the blood alcohol concentration test under the implied consent statute is to gain evidence of a person's blood alcohol level in order to determine whether he or she was driving under the influence; the procedure is investigatory in nature. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Suspension Absolute.

A defendant is not constitutionally entitled to seek limited driving privileges at any time during his or her suspension under this section; the state has an interest in traffic safety, and the detecting of alcohol-impaired drivers, and this objective is served rationally by imposing a sanction of absolute suspension upon motorists who refuse to be tested. *State v. Breed*, 111 Idaho 497, 725 P.2d 202 (Ct. App. 1986).

An order of suspension for failure to take a blood-alcohol test under this section remains in effect despite a subsequent judgment containing no period of suspension under § 18-8005. *State v. Breed*, 111 Idaho 497, 725 P.2d 202 (Ct. App. 1986).

Tribal Consent to Increased Supervision Period.

Since prior to the enactment of § 67-5101 the legislature enacted § 49-352 (repealed) which provided for a 90-day license suspension for failure to submit to a breath test, and where in 1984, the legislature repealed § 49-352 and enacted this section which provided for a 180-day suspension period, the increased suspension period did not constitute a substantial change in the law or new assumption of jurisdiction requiring tribal consent; the state had previously assumed jurisdiction in this area of the law pursuant to Congress' consent in 1963, and further permission or consent from the Nez Perce Tribe under 25 U.S.C. § 1321 is not required for enforcement of this section. *State v. McCormack*, 117 Idaho 1009, 793 P.2d 682 (1990).

Type of Test.

The choice as to which type of evidentiary test for concentration of alcohol, drugs or other intoxicating substances will be requested rests with the police officer, not the defendant. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Where, after officer erroneously informed defendant that a second BAC test would have to be a blood test rather than a breath test, defendant and attorney repeatedly requested a breath test while defendant was being processed into jail, such misinformation did not constitute a denial of defendant's right to second BAC test of his own choosing; magistrate's refusal to suppress results of state's BAC was upheld. *State v. Rountree*, 129 Idaho 146, 922 P.2d 1072 (Ct. App. 1996).

Valid Suspension.

A police officer must have probable cause to stop a driver and probable cause to request that the driver submit to a blood alcohol content test before a valid suspension for a refusal can occur. *Brink v. State*, 117 Idaho 55, 785 P.2d 619 (1990).

Venue.

The magistrate court had venue in action regarding suspension of driving privileges in the county where the defendant refused to submit to a blood test to determine the alcohol content of his blood. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Waiver of Objection.

Where, in a prosecution for aggravated driving under the influence of alcohol, the court entered a specific order directing the filing of all pretrial motions within the time set by the rules, and the defendant was put on adequate notice that he was required to file his objection to the use by the state of the test result obtained in possible violation of this section; his failure to make such a motion, absent a showing of cause, constituted waiver of the objection. *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988).

By defendants' voluntary acts in submitting to evidentiary tests pursuant to this section, defendants have waived any suppression issue that may have existed regarding the results of such tests. *State v. McCormack*, 117 Idaho 1009, 793 P.2d 682 (1990).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Admissibility of test results.
Appellate review of refusal.
Chemical test.
Measurement of blood sample.
Police request.
Refusal to take test.
Right to counsel.

Suspension of license.
Warrantless test reasonable.

Admissibility of Test Results.

The alleged failure of the police officer to advise the accused of his constitutional rights before requesting the accused to submit to a blood test under former law did not render the blood test results inadmissible and thus the

trial court did not err in refusing to suppress the evidence. *State v. Cutler*, 94 Idaho 295, 486 P.2d 1008 (1971).

The lapse of time between an accident and the extraction and testing of blood, breath, or other bodily substance to determine the alcoholic content in a defendant's system, affects only the weight given to the test results and does not affect the admissibility of the results. *State v. Sutliff*, 97 Idaho 523, 547 P.2d 1128 (1976).

Where the defendant, who was involved in an automobile accident in which a person died, signed a consent form to allow a blood alcohol test to be done after a police officer had read the former similar statute aloud to him concerning his right to refuse the test, there was substantial evidence to support the trial judge's finding the defendant had not refused the test; consequently, the court properly admitted the result of the blood alcohol test into evidence. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

Appellate Review of Refusal.

A finding as to whether a person has refused a blood alcohol test should be reviewed under the standard of clear error customarily applied to factual issues; under this standard, a factual finding will not be deemed clearly erroneous unless, after reviewing the record, an appellate court is left with a definite and firm conviction that a mistake has been committed. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

Chemical Test.

The result obtained from the Intoximeter 3000, an instrument which tests the alcohol content of a breath sampler by using infrared light energy rather than chemicals, is the product of a "chemical test" within the meaning of § 49-352 (repealed). *State v. Nichols*, 110 Idaho 823, 718 P.2d 1261 (Ct. App. 1986).

Measurement of Blood Sample.

Where there was no evidence in the record to indicate the slightest inference of any irregularity or tampering with the blood sample, the contention that there was an error in the measurement of blood sample was without merit. *State v. Cutler*, 94 Idaho 295, 486 P.2d 1008 (1971).

Police Request.

Where the testimony of police officer indicated that he had seen beer, several beer caps and bottle and can openers in the vehicle of the accused during his investigation of accident scene, and the accused was conscious and reasonably alert at the time of the request for the blood test, the officer had reasonable grounds to request the test. *State v. Cutler*, 94 Idaho 295, 486 P.2d 1008 (1971).

Refusal to Take Test.

Evidence in involuntary manslaughter prosecution of appellant's refusal to submit to a blood test was competent and admissible for, like any other act or statement voluntarily made by him, it was competent for a jury to consider and weigh, with the other evidence, and to draw from it whether the inference as to guilt or innocence may be justified thereby. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

Where intoxication was an evidentiary element of "reckless disregard" in a homicide case arising out of the operation of a motor vehicle, the accused had no constitutional right to refuse to submit to a reasonable search and examination of his person, including an examination of his blood in the manner authorized by law. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

Where defendant, injured and in a dazed state, has neither refused nor consented, and for some reason within the discretion of the officer, the test is not administered, it cannot be said that there was an express refusal to take the test. *Mills v. Swanson*, 93 Idaho 279, 460 P.2d 704 (1969).

A refusal by a motorist to take a breath test at the officer's request until she consulted with counsel was a refusal within the meaning of this section. *Mills v. Bridges*, 93 Idaho 679, 471 P.2d 66 (1970).

Where an administrative agency suspended a motorist's driver's license for his failure to submit to a blood-alcohol test after he was arrested for driving while intoxicated, the applicable standard for judicial review of the agency's decision under § 67-5215(g) (now repealed) was the "clearly erroneous" standard of review, and a reviewing court would not be allowed to independently weigh the conflicting evidence to determine whether the State had carried its burden to show, by a preponderance of the evidence, that the chemical test was offered and refused. *Mason v. State Dep't of Law Enforcement*, 103 Idaho 748, 653 P.2d 803 (Ct. App. 1982).

Where the evidence showed that despite being advised of the consequences of refusing to take a chemical blood-alcohol test, the defendant motorist continued to refuse to take the test, the evidence supported the suspension of the motorist's license. *Mason v. State Dep't of Law Enforcement*, 103 Idaho 748, 653 P.2d 803 (Ct. App. 1982).

Where a police officer observed the defendant motorist's erratic driving, saw the motorist exit his vehicle, stagger and walk unsteadily, and detected the odor of alcohol on the motorist's person, there was a sufficient objective basis for the officer to detain the motorist for further investigation; therefore, the motorist's subsequent refusal to submit to a blood-alcohol test supported the district

court's determination that the motorist's license was properly suspended. *Mason v. State Dept of Law Enforcement*, 103 Idaho 748, 653 P.2d 803 (Ct. App. 1982).

There is no general, constitutional right to refuse a blood alcohol test; such a test — which produces real, rather than testimonial or communicative, evidence — does not infringe upon any privilege against self-incrimination. Neither does a blood test, unless performed with inappropriate force, offend any basic values of fairness underlying the constitutional guaranty of due process. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

Former section 49-352 (repealed) created a statutory right — where no constitutional right existed — to refuse a blood alcohol test; a defendant's "implied consent" to the test was revoked if he expressly declined to take it. Of course, if a defendant exercised his right to refuse, after being arrested, his driving privileges could have been suspended. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

Right to Counsel.

An administrative proceeding for the suspension of a driver's license is a civil proceeding, and not a criminal prosecution, therefore a motorist does not have a constitutional right

to consult with counsel before deciding whether to take a breath test for determining level of blood alcohol. *Mills v. Bridges*, 93 Idaho 679, 471 P.2d 66 (1970).

Suspension of License.

Where motorist refused officer's request to take a breath test to determine the level of blood alcohol until she consulted with counsel and never affirmatively requested test, a prima facie case justifying the suspension order was established, since she failed to establish that the right to take the test had been withdrawn within an hour after the officer first requested she take it. *Mills v. Bridges*, 93 Idaho 679, 471 P.2d 66 (1970).

Warrantless Test Reasonable.

The administration of a blood alcohol test is a seizure of the person, and a search of his body for evidence, within the Fourth Amendment of the United States Constitution; however, the constraints of time due to natural destruction of the evidence, as alcohol is eliminated from the human body, make a warrantless blood test reasonable and appropriate. *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

Collateral References. Mental incapacity as justifying refusal to submit to tests for driving while intoxicated. 76 A.L.R.5th 597.

18-8002A. Tests of driver for alcohol concentration, presence of drugs or other intoxicating substances — Suspension upon failure of tests. — (1) Definitions. As used in this section:

- (a) "Actual physical control" means being in the driver's position of a motor vehicle with the motor running or with the vehicle moving.
- (b) "Administrative hearing" means a hearing conducted by a hearing officer to determine whether a suspension imposed by the provisions of this section should be vacated or sustained.
- (c) "Department" means the Idaho transportation department and, as the context requires, shall be construed to include any agent of the department designated by rule as hereinafter provided.
- (d) "Director" means the director of the Idaho transportation department.
- (e) "Evidentiary testing" means a procedure or test or series of procedures or tests utilized to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in a person, including additional testing authorized by subsection (6) of this section. An evidentiary test for alcohol concentration shall be based on a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath, or sixty-seven (67) milliliters of urine. Analysis of blood, breath or urine for the purpose of determining alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by the Idaho state police, or by any other method approved by the Idaho state police. Notwithstanding

any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated and approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

(f) "Hearing officer" means a person designated by the department to conduct administrative hearings. The hearing officer shall have authority to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas, regulate the course and conduct of the hearing and make a final ruling on the issues before him.

(g) "Hearing request" means a request for an administrative hearing on the suspension imposed by the provisions of this section.

(2) Information to be given. At the time of evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that if the person refuses to submit to or fails to complete evidentiary testing, or if the person submits to and completes evidentiary testing and the test results indicate an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, the person shall be informed substantially as follows (but need not be informed verbatim):

If you refuse to submit to or if you fail to complete and pass evidentiary testing for alcohol or other intoxicating substances:

(a) The peace officer will seize your driver's license and issue a notice of suspension and a temporary driving permit to you, but no peace officer will issue you a temporary driving permit if your driver's license or permit has already been and is suspended or revoked. No peace officer shall issue a temporary driving permit to a driver of a commercial vehicle who refuses to submit to or fails to complete and pass an evidentiary test;

(b) You have the right to request a hearing within seven (7) days of the notice of suspension of your driver's license to show cause why you refused to submit to or to complete and pass evidentiary testing and why your driver's license should not be suspended;

(c) If you refused or failed to complete evidentiary testing and do not request a hearing before the court or do not prevail at the hearing, your driver's license will be suspended. The suspension will be for one hundred eighty (180) days if this is your first refusal. The suspension will be for one (1) year if this is your second refusal within five (5) years. You will not be able to obtain a temporary restricted license during that period; and

(d) If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license will be suspended. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period;

(e) After submitting to evidentiary testing you may, when practicable, at your own expense, have additional tests made by a person of your own choosing.

(3) Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:

(a) What testing is required to complete evidentiary testing under this section; and

(b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1) (e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. A test for alcohol concentration in blood or urine as defined in section 18-8004, Idaho Code, that is reported by the Idaho state police or by any laboratory approved by the Idaho state police to perform this test will be valid for the purposes of this section.

(4) Suspension.

(a) Upon receipt of the sworn statement of a peace officer that there existed legal cause to believe a person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances and that the person submitted to a test and the test results indicated an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, the department shall suspend the person's driver's license, driver's permit, driving privileges or nonresident driving privileges:

(i) For a period of ninety (90) days for a first failure of evidentiary testing under the provisions of this section. The first thirty (30) days of the suspension shall be absolute and the person shall have absolutely no driving privileges of any kind. Restricted driving privileges applicable during the remaining sixty (60) days of the suspension may be requested as provided in subsection (9) of this section.

(ii) For a period of one (1) year for a second and any subsequent failure of evidentiary testing under the provisions of this section within the immediately preceding five (5) years. No driving privileges of any kind shall be granted during the suspension imposed pursuant to this subsection.

The person may request an administrative hearing on the suspension as provided in subsection (7) of this section. Any right to contest the suspension shall be waived if a hearing is not requested as therein provided.

(b) The suspension shall become effective thirty (30) days after service upon the person of the notice of suspension. The notice shall be in a form provided by the department and shall state:

(i) The reason and statutory grounds for the suspension;

- (ii) The effective date of the suspension;
- (iii) The suspension periods to which the person may be subject as provided in subsection (4)(a) of this section;
- (iv) The procedures for obtaining restricted driving privileges;
- (v) The rights of the person to request an administrative hearing on the suspension and that if an administrative hearing is not requested within seven (7) days of service of the notice of suspension the right to contest the suspension shall be waived;
- (vi) The procedures for obtaining an administrative hearing on the suspension;
- (vii) The right to judicial review of the hearing officer's decision on the suspension and the procedures for seeking such review.

(5) Service of suspension by peace officer or the department. If the driver submits to evidentiary testing after the information in subsection (2) of this section has been provided and the results of the test indicate an alcohol concentration or the presence of drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code:

(a) The peace officer shall take possession of the person's driver's license, shall issue a temporary permit which shall be valid for a period not to exceed thirty (30) days from the date of issuance, and, acting on behalf of the department, will serve the person with a notice of suspension in the form and containing the information required under subsection (4) of this section. The department may serve the person with a notice of suspension if the peace officer failed to issue the notice of suspension or failed to include the date of service as provided in subsection (4)(b) of this section.

(b) Within five (5) business days following service of a notice of suspension the peace officer shall forward to the department a copy of the completed notice of suspension form upon which the date of service upon the driver shall be clearly indicated, a copy of any completed temporary permit form along with any confiscated driver's license, a certified copy or duplicate original of the results of all tests for alcohol concentration, as shown by analysis of breath administered at the direction of the peace officer, and a sworn statement of the officer, which may incorporate any arrest or incident reports relevant to the arrest and evidentiary testing setting forth:

- (i) The identity of the person;
- (ii) Stating the officer's legal cause to stop the person;
- (iii) Stating the officer's legal cause to believe that the person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code;
- (iv) That the person was advised of the consequences of taking and failing the evidentiary test as provided in subsection (2) of this section;
- (v) That the person was lawfully arrested;
- (vi) That the person was tested for alcohol concentration, drugs or other intoxicating substances as provided in this chapter, and that the

results of the test indicated an alcohol concentration or the presence of drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code.

If an evidentiary test of blood or urine was administered rather than a breath test, the peace officer or the department shall serve the notice of suspension once the results are received. The sworn statement required in this subsection shall be made on forms in accordance with rules adopted by the department.

(c) The department may serve the person with a notice of suspension if the peace officer failed to issue the notice of suspension or failed to include the date of service as provided in subsection (4)(b) of this section.

(6) Additional tests. After submitting to evidentiary testing at the request of the peace officer, the person may, when practicable, at his own expense, have additional tests for alcohol concentration or for the presence of drugs or other intoxicating substances made by a person of his own choosing. The person's failure or inability to obtain additional tests shall not preclude admission of the results of evidentiary tests administered at the direction of the peace officer unless additional testing was denied by the peace officer.

(7) Administrative hearing on suspension. A person who has been served with a notice of suspension after submitting to an evidentiary test may request an administrative hearing on the suspension before a hearing officer designated by the department. The request for hearing shall be in writing and must be received by the department within seven (7) calendar days of the date of service upon the person of the notice of suspension, and shall include what issue or issues shall be raised at the hearing. The date on which the hearing request was received shall be noted on the face of the request.

If a hearing is requested, the hearing shall be held within twenty (20) days of the date the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten (10) day period. Such extension shall not operate as a stay of the suspension and any temporary permit shall expire thirty (30) days after service of the notice of suspension, notwithstanding an extension of the hearing date beyond such thirty (30) day period. Written notice of the date and time of the hearing shall be sent to the party requesting the hearing at least seven (7) days prior to the scheduled hearing date. The department may conduct all hearings by telephone if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.

The hearing shall be recorded. The sworn statement of the arresting officer, and the copy of the notice of suspension and any temporary permit issued by the officer shall be admissible at the hearing without further evidentiary foundation. The results of any tests for alcohol concentration or the presence of drugs or other intoxicating substances by analysis of blood, urine or breath administered at the direction of the peace officer and the records relating to calibration, certification, approval or quality control pertaining to equipment utilized to perform the tests shall be admissible as provided in section 18-8004(4), Idaho Code. The arresting officer shall not be

required to participate unless directed to do so by a subpoena issued by the hearing officer.

The burden of proof shall be on the person requesting the hearing. The hearing officer shall not vacate the suspension unless he finds, by a preponderance of the evidence, that:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

If the hearing officer finds that the person has not met his burden of proof, he shall sustain the suspension. The hearing officer shall make findings of fact and conclusions of law on each issue and shall enter an order vacating or sustaining the suspension. If the suspension is vacated, the person's driver's license, unless unavailable by reason of an existing suspension, revocation, cancellation, disqualification or denial shall be returned to him. The findings of fact, conclusions of law and order entered by the hearing officer shall be considered a final order pursuant to the provisions of chapter 52, title 67, Idaho Code, except that motions for reconsideration of such order shall be allowed and new evidence can be submitted.

The facts as found by the hearing officer shall be independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect the suspension required to be imposed under the provisions of this section. If a license is suspended under this section and the person is also convicted on criminal charges arising out of the same occurrence for a violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code, both the suspension under this section and the suspension imposed pursuant to the provisions of section 18-8005 or 18-8006, Idaho Code, shall be imposed, but the periods of suspension shall run concurrently, with the total period of suspension not to exceed the longer of the applicable suspension periods, unless the court ordering the suspension in the criminal case orders to the contrary.

(8) Judicial review. A party aggrieved by the decision of the hearing officer may seek judicial review of the decision in the manner provided for judicial review of final agency action provided in chapter 52, title 67, Idaho Code.

(9) Restricted driving privileges. A person served with a notice of suspension for ninety (90) days pursuant to this section may apply to the

department for restricted driving privileges, to become effective after the thirty (30) day absolute suspension has been completed. The request may be made at any time after service of the notice of suspension. Restricted driving privileges will be issued for the person to travel to and from work and for work purposes, to attend an alternative high school, work on a GED, for postsecondary education, or to meet the medical needs of the person or his family if the person is eligible for restricted driving privileges.

(10) Rules. The department may adopt rules under the provisions of chapter 52, title 67, Idaho Code, deemed necessary to implement the provisions of this section. [I.C., § 18-8002A, as added by 1993, ch. 413, § 2, p. 1515; am. 1994, ch. 357, § 1, p. 1117; am. 1997, ch. 238, § 1, p. 689; am. 1999, ch. 80, § 1, p. 227; am. 2000, ch. 469, § 27, p. 1450; am. 2004, ch. 126, § 1, p. 422.]

Compiler's notes. Section 3 of S.L. 1993, ch. 413 is compiled as § 49-328.

Section 2 of S.L. 1994, ch. 357 is compiled as § 49-326.

Section 2 of S.L. 1999, ch. 80 is compiled as § 18-8005.

Sections 26 and 28 of S.L. 2000, ch. 469 are compiled as §§ 18-4512 and 18-8004, respectively.

Section 4 of S.L. 1993, ch. 413 read: "Section 3 of this act shall be in full force and effect on and after July 1, 1993. The remaining sections of this act shall be in full force and effect on and after July 1, 1994."

Section 2 of S.L. 2004, ch. 126 is compiled as § 18-8306.

Sec. to sec. ref. This section is referred to in § 49-328.

Cited in: *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

ANALYSIS

Advisory form.

Constitutionality.

—Double jeopardy.

Construction.

Advisory Form.

Defendant's license suspension could not be upheld where defendant was read the correct information listed in § 18-8002(3), but was incorrectly advised that if he took and failed the test he would have his license automatically suspended for a period of ninety days or one year. This latter information was part of this section, a statute that was not in effect at the time defendant was requested to submit to the BAC, and the additional erroneous information caused the advisory form read to defendant to not meet the requirements of the law in effect at the time. *Head v. State*, 136 Idaho 409, 34 P.3d 1092 (Ct. App. 2000).

Suspension advisory form adequately ad-

vised individual of the consequences of taking and failing the evidentiary test under this section even though the advisory form did not match the information requirements in the statute verbatim where individual was substantially informed of his rights and duties under paragraph (2). *Halen v. State*, 136 Idaho 829, 41 P.3d 257 (2002).

Constitutionality.

—Double Jeopardy.

Interpreting the Idaho Constitution's double jeopardy provision in the same manner as the U.S. Constitution, the license suspension of defendant, following her failure to pass a sobriety test, did not constitute punishment for the purposes of the double jeopardy clause of the U.S. Constitution and she could, in addition to the license suspension under § 18-8002A, be prosecuted for driving under the influence of alcohol pursuant to § 18-8004. *State v. Reichenberg*, 128 Idaho 452, 915 P.2d 14 (1996).

Construction.

A suspension pursuant to this section is in addition to any suspension imposed pursuant to § 18-8005, penalties. *State v. Talavera*, 127 Idaho 700, 905 P.2d 633 (1995).

The language of paragraph (9) does not allow the Idaho Department of Transportation to differentiate between a resident's and nonresident's ability to apply for restricted driving privileges. Paragraph (4) clearly distinguishes between driver's licenses, driver's privileges and nonresident driver's privileges, where paragraph (9) does not. Paragraph (9) states that a person served with a notice of suspension may apply to the department for restricted driving privileges rather than breaking down each type of license or privilege as in paragraph (4). Nonresidents can apply for restricted driving privileges under paragraph (9) so long as the nonresident

applicant meets one of the circumstances listed in that paragraph. *Druffel v. State*, 136 Idaho 853, 41 P.3d 739 (2002).

Hearing officer was not authorized to vacate a driver's license suspension based upon technical flaws in the documents that were delivered to the Idaho Transportation Department (ITD) by the initiating law enforcement officer; it was the driver's burden to present evidence showing one or more grounds for relief enumerated in § 18-8002A(7) and to prove that, in fact, the blood test was not conducted in accordance with legal requirements. That burden was not met by merely showing that the documents in the hands of the ITD were inadequate or inadmissible to show whether legal cause existed or whether the blood test was conducted properly. *Kane v. State (In re Kane)*, — Idaho —, 83 P.3d 130 (Ct. App. 2003).

It was not the Idaho Transportation Department's (ITD) burden at an administrative hearing to prove legal cause for a traffic stop, to prove the reliability of the blood alcohol tests, or to disprove any of the possible grounds for challenging a suspension of a

driver's license under § 188002A (7); to the contrary, it was the driver's burden to present evidence affirmatively showing one or more of the grounds for relief enumerated in § 18-8002A(7), that is, it was his burden to prove that, in fact, the officer lacked legal cause to stop his vehicle or that the blood test was, in fact, not conducted in accordance with legal requirements. *Kane v. State (In re Kane)*, — Idaho —, 83 P.3d 130 (Ct. App. 2003).

Even if a hearing officer's jurisdiction encompassed authority to reduce a driver's license suspension period, the hearing officer's contrary conclusion did not prejudice the driver where the driver's challenge to the suspension enhancement failed for lack of evidence. *Kane v. State (In re Kane)*, — Idaho —, 83 P.3d 130 (Ct. App. 2003).

Collateral References. Authentication of blood sample taken from human body for purposes of determining blood alcohol content. 76 A.L.R.5th 1.

Authentication of organic nonblood specimen taken from human body for purposes of analysis. 78 A.L.R.5th 1.

18-8002B. Enforcement of 18-8002A, Idaho Code, stayed. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-8002B, as added by 1995, ch. 190, § 1, p. 681; am. 1997, ch. 238,

§ 2, p. 689, was repealed by § 3 of S.L. 1997, ch. 238, effective January 1, 1998.

18-8003. Persons authorized to withdraw blood for the purposes of determining content of alcohol or other intoxicating substances.

— (1) Only a licensed physician, qualified medical technologist, registered nurse, phlebotomist trained in a licensed hospital or educational institution or other medical personnel trained in a licensed hospital or educational institution to withdraw blood can, at the order or request of a peace officer, withdraw blood for the purpose of determining the content of alcohol, drugs or other intoxicating substances therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen. For purposes of this section: (a) the term "qualified medical technologist" shall be deemed to mean a person who meets the standards of a "clinical laboratory technologist" as set forth by the then current rules and regulations of the social security administration of the United States department of health and human services pursuant to subpart M of part 405, chapter III, title 20, of the code of federal regulation; and (b) the terms "phlebotomist" and "other medical personnel" shall be deemed to mean persons who meet the standards for the withdrawing of blood as designated and qualified by the employing medical facility or other employing entity of those persons.

(2) The person tested may, at his own expense, have a person of his own choosing, who is authorized to make a test, administer an evidentiary test for alcohol concentration in addition to the one administered at the request

of a peace officer. [I.C., § 18-8003, as added by 1984, ch. 22, § 2, p. 25; am. 1992, ch. 133, § 2, p. 416.]

Compiler's notes. Section 3 of S.L. 1992, ch. 133 is compiled as § 67-7034.

Cited in: State v. Albright, 110 Idaho 748, 718 P.2d 1186 (1986); State v. Shanahan, 133 Idaho 896, 994 P.2d 1059 (Ct. App. 1999); State v. Cooper, 136 Idaho 697, 39 P.3d 637 (Ct. App. 2001).

Due Process.

The destruction of the blood samples after blood alcohol testing was done by trained technicians at an independent hospital did not result in a deprivation of due process

under the United States Constitution, where there was no indication that the destruction of the blood samples represented a calculated effort by law enforcement personnel to circumvent disclosure requirements, the defendants did not establish that the blood samples, if available, would have played a significant role in their defense, and the defendants could have had their own blood tests run pursuant to subsection (2) of this section. State v. Albright, 110 Idaho 748, 718 P.2d 1186 (1986).

18-8004. Persons under the influence of alcohol, drugs or any other intoxicating substances. —

(1)(a) It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

(b) It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.04 or higher but less than 0.08, as defined in subsection (4) of this section, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a commercial motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

(c) It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08 or higher, as defined in subsection (4) of this section, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a commercial motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

(d) It is unlawful for any person under the age of twenty-one (21) years who has an alcohol concentration of at least 0.02 but less than 0.08, as defined in subsection (4) of this section, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public. Any person violating this subsection shall be subject to the penalties provided in section 18-8004A, Idaho Code.

(2) Any person having an alcohol concentration of less than 0.08, as defined in subsection (4) of this section, as shown by analysis of his blood,

urine, or breath, by a test requested by a police officer shall not be prosecuted for driving under the influence of alcohol, except as provided in subsection (3), subsection (1)(b) or subsection (1)(d) of this section. Any person who does not take a test to determine alcohol concentration or whose test result is determined by the court to be unreliable or inadmissible against him, may be prosecuted for driving or being in actual physical control of a motor vehicle while under the influence of alcohol, drugs, or any other intoxicating substances, on other competent evidence.

(3) If the results of the test requested by a police officer show a person's alcohol concentration of less than 0.08, as defined in subsection (4) of this section, such fact may be considered with other competent evidence of drug use other than alcohol in determining the guilt or innocence of the defendant.

(4) For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

(5) "Actual physical control" as used in this section, shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

(6) Notwithstanding any other provision of law, any evidence of conviction under this section shall be admissible in any civil action for damages resulting from the occurrence. A conviction for the purposes of this section means that the person has pled guilty or has been found guilty, notwithstanding the form of the judgment(s) or withheld judgment(s).

(7) The fact that any person charged with a violation of the provisions of this chapter involving being under the influence of any drug, or any combination of drugs with alcohol or any other intoxicating substance, is or has been entitled to use such drug under the laws of this state or of any other jurisdiction shall not constitute a defense against any charge of a violation of the provisions of this chapter. [I.C., § 18-8004, as added by 1984, ch. 22, § 2, p. 25; am. 1985, ch. 142, § 1, p. 386; am. 1987, ch. 122, § 2, p. 247; am. 1988, ch. 47, § 4, p. 54; am. 1989, ch. 88, § 61, p. 151; am. 1990, ch. 45, § 44, p. 71; am. 1994, ch. 422, § 1, p. 1322; am. 1997, ch. 158, § 1, p. 457; am. 1997, ch. 307, § 1, p. 911; am. 1998, ch. 70, § 1, p. 263; am. 2000, ch. 469, § 28, p. 1450; am. 2002, ch. 253, § 1, p. 728.]

Compiler's notes. This section was amended by two 1997 acts — ch. 158, § 1 and ch. 307, § 2, both effective July 1, 1997, which appear to be compatible and have been compiled together.

The 1997 amendment by ch. 158, § 1 in subsections (1)(a), (c) and (d), (2) and (3) substituted "0.08" for "0.10" and in subsection (1)(b) substituted "0.07" for "0.7".

The 1997 amendment by ch. 307, § 1 in subsection (5) in the first sentence substituted "impairs the driver's ability to safely operate" for "renders him incapable of safely driving" following "to a degree which".

Sections 3 and 5 of S.L. 1988, ch. 47 are compiled as §§ 37-2744 and former 49-1314, respectively.

Section 60 of S.L. 1989, ch. 88 is compiled as § 18-8002.

Section 43 of S.L. 1990, ch. 45 is compiled as § 18-8002.

Sections 27 and 29 of S.L. 2000, ch. 469 are compiled as §§ 18-8002A and 18-8102, respectively.

Section 2 of S.L. 1985, ch. 142 declared an emergency. Approved March 21, 1985.

Section 47 of S.L. 1990, ch. 45 read: "This act shall be in full force and effect on and after July 1, 1990, with the exception that the provisions within each applicable section of Idaho Code relating to classes of driver's licenses shall take effect no later than September 1, 1990, as determined by the director of the Idaho transportation department, and until that time, existing laws shall remain in effect." Approved March 12, 1990.

Sec. to sec. ref. This section is referred to in §§ 18-1501, 18-4006, 18-8001, 18-8002, 18-8002A, 18-8004C, 18-8005, 18-8006, 23-505, 49-240, 49-307, 49-325, 72-1003 and 72-1016.

Rule to sec. ref. This section is referred to in M.C.R., Rule 13.

Cited in: State v. Simpson, 112 Idaho 644, 734 P.2d 669 (Ct. App. 1987); Nowoj v. State, 115 Idaho 134, 764 P.2d 111 (Ct. App. 1988); State v. Woolery, 116 Idaho 368, 775 P.2d 1210 (1989); State v. Bacon, 117 Idaho 679, 791 P.2d 429 (1990); State v. Deitz, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991); State v. Tate, 122 Idaho 366, 834 P.2d 883 (Ct. App. 1992); State v. Litz, 122 Idaho 387, 834 P.2d 904 (Ct. App. 1992); State v. Waldie, 126 Idaho 864, 893 P.2d 811 (Ct. App. 1995); State v. Gleason, 130 Idaho 586, 944 P.2d 721 (Ct. App. 1997); State v. Smith, 130 Idaho 759, 947 P.2d 1007 (Ct. App. 1997); State v. Anderson, 130 Idaho 765, 947 P.2d 1013 (Ct. App. 1997); State v. Keetch, 134 Idaho 327, 1 P.3d 828 (Ct. App. 2000); State v. Shearer, 136 Idaho 217, 30 P.3d 995 (Ct. App. 2001).

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Adequately Informed of Charge.

The Idaho Uniform Citation which contained a police officer's certification that he had reasonable cause to believe defendant committed the act of "driving under the influence" at a specified time and place adequately informed defendant of the charge against him. *State v. Denton*, 115 Idaho 402, 766 P.2d 1283 (Ct. App. 1989).

Aggravated Driving Under the Influence.

By cross-referencing to the provisions of this section, § 18-8006 allows for prosecutions for aggravated driving without the necessity for the state to prove that the alcohol or other substance-related impairment was actually sufficient to have caused certain driving behavior, which in turn caused great bodily injury to another. To interpret that statute otherwise would be to disregard the per se nature of the alcohol concentration aspect of the definition of drunk driving. *State v. Nelson*, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

Section 18-8006 provides as an element of the offense that the defendant must have "caused" great bodily harm to the victim. The requirement of causation in the aggravated driving statute is in accord with the concept that strict liability crimes are disfavored in Idaho. *State v. Nelson*, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

To convict defendant of aggravated driving while under the influence of intoxicating substances, the state need not prove that the great bodily injury was proximately caused by the driver's intoxicated state which in turn caused certain driving conduct. The statute requires that some causation, however, be proved, but the phrase "in committing" should be interpreted to mean that a defendant may be found guilty of aggravated driving under the influence if he or she causes that statutorily-specified harm while in the course of violating this section. This interpretation is in keeping with a legislative intent to criminalize driving conduct which would normally fall within the realm of negligence when it is done while the person is in violation of the provisions of this section. *State v. Nelson*, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

Arrest on Indian Reservation.

The word "upon" in clause G of § 67-5101 does not limit the jurisdiction of state officials

to enforce state traffic laws to the actual road right-of-way; thus, a police officer had the authority to arrest defendant in Indian country for the offense of driving under the influence on a public road. *State v. Barros*, 131 Idaho 379, 957 P.2d 1095 (1998).

Articulable Suspicion.

An officer's observations that a motorist paused for five or six seconds after a traffic light turned green before moving through the light, that the motorist's vehicle was very close to parked cars on a narrow street, and that it was approximately 2:45 a.m. on a Sunday morning, did not give rise to a reasonable and articulable suspicion that the motorist was driving while under the influence. *State v. Emory*, 119 Idaho 661, 809 P.2d 522 (Ct. App. 1991).

Basis for Further Investigation.

Where police officer dispatched to investigate "a possible DUI driver" first arrived at the scene of the alleged violation and saw a man sitting behind the wheel of a running vehicle with his head slumped over, and where the vehicle was parked in an isolated area on a snowy night, under those circumstances it was reasonable for the officer to investigate further to see if the driver was ill and in need of help or was incapable of driving. *State v. Webb*, 118 Idaho 99, 794 P.2d 1155 (Ct. App. 1990).

The initial approach of defendant in his parked, but running car was a reasonable, unintrusive inquiry by the police and did not trigger Fourth Amendment protections. After the encounter, the police possessed sufficient articulable suspicion to detain defendant and investigate whether he was under the influence when in the driver's position in his car. *State v. Zubizarreta*, 122 Idaho 823, 839 P.2d 1237 (Ct. App. 1992).

The appearance of the defendant's eyes, his nervous behavior, and his apparent avoidance of eye contact suggested the possibility that he was driving under the influence of intoxicants, justifying a brief questioning by a police officer. *State v. Albaugh*, 133 Idaho 587, 990 P.2d 753 (Ct. App. 1999).

Blood Alcohol Content.

A breath test showing an alcohol concentration of .10 percent or more is not conclusive proof of guilt of the offense of driving while under the influence; the state has the burden of proving beyond a reasonable doubt that the .10 percent reading is correct. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Defendant's proffered evidence of the variability of standard 2100:1 partition ratio was irrelevant in DUI prosecution because breath alcohol concentration above the prescribed limit was a per se violation of the statute

regardless of the blood alcohol content. *State v. Hardesty*, 136 Idaho 707, 39 P.3d 647 (Ct. App. 2002).

Because § 18-8004C gave importance to blood alcohol concentration evidence even if there was other overwhelming evidence that a defendant was driving under the influence of alcohol, and as it was not the prerogative of the defendant to determine what evidence the State could gather to support his prosecution, defendant's argument that a forcible blood draw was unreasonable because it was unnecessary for his prosecution lacked merit. *State v. Worthington*, 138 Idaho 470, 65 P.3d 211 (Ct. App. 2002).

Burden of Proof.

A breath test showing an alcohol concentration of .10 percent or more is not conclusive proof that one is guilty of driving under the influence; the state still has the burden of proving beyond a reasonable doubt that the .10 percent reading was correct. *State v. Barker*, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992).

Where the state was unable to present anything in the record to establish the existence of prior felonies, the state failed to meet its burden of proving the existence of prior convictions, upon which the state relied to enhance a charge of DUI or DWP from a misdemeanor to a felony. *State v. Coby*, 128 Idaho 90, 910 P.2d 762 (1996).

Constitutionality.

This section is not constitutionally defective for failure to precisely define the term "motor vehicle." *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988).

—Double Jeopardy.

Interpreting the Idaho Constitution's double jeopardy provision in the same manner as the U.S. Constitution, the license suspension of defendant, following her failure to pass a sobriety test, did not constitute punishment for the purposes of the double jeopardy clause of the U.S. Constitution and she could, in addition to the license suspension under § 18-8002A, be prosecuted for driving under the influence of alcohol pursuant to § 18-8004. *State v. Reichenberg*, 128 Idaho 452, 915 P.2d 14 (1996).

—Due Process.

The requirements of due process were satisfied because in 1990 defendant was only required by statute to be given notice of the then-current possible penalties for further convictions and it was immaterial that the law changed in 1992. *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000).

Construction.

This section provides for one crime with two alternative methods of proof; the state may

establish the violation per se by proof of a blood alcohol content of .10 percent or, alternatively, by proving with other circumstantial evidence that the defendant was driving while under the influence of alcohol. *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987).

Construction with Other Statutes.

Because the defendant elected to operate her snowmobile on a public roadway while intoxicated, her actions came within the purview of § 67-7110(2) and this section, and the prosecutor had the discretion to charge her under either statute. *State v. Barnes*, 133 Idaho 378, 987 P.2d 290 (1999).

Contempt.

Where the primary purpose of the contempt order against defendant, entered after she pled guilty to driving under the influence, was to coerce compliance with the court's order, the contempt order was a civil contempt order and no statute of limitations applied; contempt order affirmed. *State v. Schorzman*, 129 Idaho 313, 924 P.2d 214 (1996).

Corpus Delicti.

Defendant's conviction of driving under the influence, Idaho Code §§ 18-8004(1)(a) and 18-8004C, was proper, as the State met its burden of showing corpus delicti independently from defendant's extrajudicial admissions by providing sufficient evidence that defendant was driving while intoxicated, and because the convictions were supported by sufficient evidence, based upon defendant's statements and a blood alcohol test result. *State v. Roth*, 138 Idaho 820, 69 P.3d 1081 (Ct. App. 2003).

Deficient Breath Samples.

Where breathalyzer samples were deficient because the defendant failed to blow continuously into the instrument for a sufficient period of time, and where he did not claim that the testing officer deviated from the required procedures or that the machine functioned improperly, the defendant failed to prove the state would be unable to lay proper foundation for the breath test, and the magistrate properly denied the defendant's motion in limine. *State v. Mazzuca*, 132 Idaho 868, 979 P.2d 1226 (Ct. App. 1999).

Disqualification of Magistrate.

In prosecution for driving under the influence, where defendant did not make any particularized charge of bias or prejudice, being content with generalized allegations that magistrate was biased against him or against accused "drunk drivers" in general, there was nothing which would support defendant's assertion against magistrate and thus motion for disqualification was properly denied. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

Where defendant's evidence indicated defendant drove with his headlights on high beam, although several oncoming vehicles flashed their lights at him, his vehicle weaved, crossed the fog line and almost drove onto the grass at the side of the road, was slow in responding to the officer's flashing lights, after getting out of the vehicle, he swayed as he stood and had to use the vehicle to keep his balance, he smelled of alcohol, and failed the dexterity tests, and where he testified that he had consumed six drinks prior to his arrest and this was confirmed by the breath test which indicated blood alcohol concentration of .19 and .20, finding of guilty was supported by substantial evidence and would not be disturbed on appeal. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

Double Jeopardy.

Defendant's previous conviction and sentence for inattentive driving, arising from the same driving incident, barred the prosecution for DUI. *State v. Smith*, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991).

Where police stop a motorist who has been driving while under the influence of alcohol, it is clear that the more dangerous conduct which the legislature sought to prevent has already occurred and the motorist's continuing control over his stopped vehicle is not an additional event, but is merely incidental to his act of driving; therefore, the state cannot circumvent the mandate of I.C. § 18-301 (now repealed) by attempting to carve a defendant's single course of conduct into separate "temporal events" in order to charge the defendant with both DUI and erratic driving. *State v. Smith*, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991).

Section 18-301 (now repealed) did not bar prosecution of defendant for driving under the influence when defendant had earlier been convicted and sentenced for violating § 49-1404 for fleeing from the police officer who attempted to stop him for DUI. *State v. Castaneda*, 125 Idaho 234, 869 P.2d 234 (Ct. App. 1994).

Defendant's assertion that when he was arrested on the driving under the influence of alcohol (DUI) charge, he was also cited for driving without privileges (DWP) because his license had been suspended as a result of previous violations, and that his plea of guilty and sentence on the DWP offense barred the DUI prosecution was without merit, as such circumstances did not constitute double jeopardy. *State v. Flynn*, 127 Idaho 790, 906 P.2d 640 (Ct. App. 1995).

Driving on Shoulder.

Where the deputy observed defendant drive through a right turn lane and through a slow vehicle turnout, the deputy possessed reasonable suspicion that defendant was violating

§ 49-630 for driving on the shoulder of the highway, rather than on the roadway, when the traffic stop was made. *State v. Anderson*, 134 Idaho 552, 6 P.3d 408 (Ct. App. 2000).

Due Process.

The destruction of the blood samples after blood alcohol testing was done by trained technicians at an independent hospital did not result in a deprivation of due process under the United States Constitution, where there was no indication that the destruction of the blood samples represented a calculated effort by law enforcement personnel to circumvent disclosure requirements, the defendants did not establish that the blood samples, if available, would have played a significant role in their defense, and the defendants could have had their own blood tests run pursuant to subsection (2) of § 18-8003. *State v. Albright*, 110 Idaho 748, 718 P.2d 1186 (1986).

There was no due process violation due to the fact that individual suspected of DUI was not offered the blood alcohol concentration test of his choice; it is not the licensee who can choose the BAC test to be given; however, the licensee has the opportunity to test the sufficiency of the original test results, and avoid the consequences of an erroneous deprivation of his or her driving privileges. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Essential Elements.

The name of the highway upon which defendant drove is not an essential element of the driving under the influence statute and need not be proved by the prosecution. All that need be demonstrated by the prosecution with regard to that element is that the offense occurred upon a highway in the state. Therefore, incorrect designation of highway number on jury instruction was harmless error. *State v. Hanson*, 130 Idaho 842, 949 P.2d 590 (Ct. App. 1997).

Evidence.

The result of the blood-alcohol tests were admissible, even though the testimony did not establish what formula was used by the machine to calculate blood-alcohol content, where the evidence sufficiently established that the machine was approved by the department of health and welfare, and that the machine was properly calibrated and maintained. *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987).

In prosecution for driving under the influence of alcohol, the failure to admit evidence that the police department recognized a .02 margin of error for the breathalyzer was harmless, where the arresting officer testified that when initially confronted by the police,

the defendant found it difficult to rise, was unstable on his feet, suffered from slurred speech, was belligerent, and smelled of alcohol, the defendant's condition prompted two officers to advise him not to ride his motorcycle, and the defendant was arrested approximately ten minutes later. *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988).

To admit the blood alcohol test result, the state must provide adequate foundation evidence consisting either of expert testimony or a showing that the test was administered in conformity with the applicable test procedure. *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988).

In a prosecution for aggravated driving while under the influence of alcohol, the labeling on the blood-alcohol test kit with its manufacturer's certificate, satisfied for foundational purposes the requisite showing of authenticity required to establish the presence of the contested chemicals. *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988).

The state may establish guilt either by evidence showing that the defendant was driving with a blood alcohol level of .10 percent or higher, or by showing — under a totality of the evidence — that the defendant was driving under the influence, and the jury may infer from a blood alcohol test result what the probable concentration was while the defendant was driving. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

In a prosecution for driving under the influence of alcohol, a letter from the Department of Health and Welfare continuing its approval for the hospital's laboratory, was sufficient to demonstrate proper certification and approval in order to admit results of the hospital's analysis of blood for determination of blood alcohol concentration. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

Evidence supported a conviction under this section where the defendant was found intoxicated in the driver's seat of his automobile, asleep, with the lights on and the motor running; defendant admitted he had been driving the automobile prior to his discovery and fully intended to continue his journey home. *State v. Cheney*, 116 Idaho 917, 782 P.2d 40 (Ct. App. 1989).

Subsection (4) of this section provides for an expedient method for admitting blood alcohol content test results into evidence when the analysis is conducted pursuant to health and welfare standards, however, establishing the reliability and accuracy of such test results can be accomplished alternatively through expert testimony at trial. *State v. Phillips*, 117 Idaho 609, 790 P.2d 390 (Ct. App. 1990).

Evidence of scientific measurement of alcohol concentration is governed by statute. Such evidence must be in the form of an acceptable test of a subject's blood, breath or urine,

conducted in accordance with standards approved by the Department of Law Enforcement. There is no provision for extrapolating an individual's probable alcohol concentration by the use of charts or graphs such as that published in the Idaho Driver's Manual. *State v. Andrus*, 118 Idaho 711, 800 P.2d 107 (Ct. App. 1990).

It is not necessary to prove that the defendant could not drive safely or prudently; it is sufficient to prove only that his ability to drive was impaired by the influence of alcohol. Further, it is not necessary that the state prove impairment to any specified degree. As a practical matter, however, the state must prove the impairment by observations of some type of ascertainable conduct or effect. *State v. Andrus*, 118 Idaho 711, 800 P.2d 107 (Ct. App. 1990).

Defendant's argument that the magistrate erred with regard to the admission of the results of the blood alcohol test administered by officer in that first, magistrate "coached" the deputy prosecutor by advising her how to lay the foundation to have the test admitted and second, an inadequate foundation was laid for the admission of the test was without merit; such statements made by the magistrate were nothing more than explanations of her rulings and the mere expression of a legal conclusion regarding the sufficiency of foundational evidence is not error. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

In prosecution for driving under the influence, foundation for admission of breath test was proper where the record indicated that where the Intoximeter 3000 was in proper working order and the officer was certified as an operator, instructor, and technician on the machine, he followed all procedures on which he had been instructed in administering the test and the machine was certified by the Idaho Department of Health and Welfare and had been properly calibrated and tested. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

The horizontal gaze nystagmus (HGN) test is reliable and was properly admitted by the district court as evidence of DUI. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

As a matter of law, a driver's consent to take a required evidentiary test must be unconditional and based on the strong state interest in protecting the public from drunk drivers and from the plain language of the statute, it is evident that the legislature presumed a driver's consent to take an evidentiary test to be unconditional; therefore, even if the defendant's request is reasonable, the defendant cannot condition submission to an evidentiary test on the jailer's compliance with the request. *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

Defendant did not show that he was physically unable to take the test and the state presented uncontroverted evidence that being handcuffed does not render a person physically incapable of taking a breathalyzer test; therefore, the burden of proof rested on the defendant to prove physical inability to take the test or to establish another cause of sufficient magnitude to refuse to take the test. *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

The state provided a sufficient foundation to establish that defendant's blood-alcohol content test was performed by a laboratory or method approved by the Idaho Department of Law Enforcement as required by subsection (4) of this section. *State v. Uhlry*, 121 Idaho 1020, 829 P.2d 1369 (Ct. App. 1992).

—Admission.

—Proper.

In DUI prosecution, where deputy's testimony relating to HGN test results was offered not as independent scientifically sound evidence of defendant's intoxication but rather for the same purpose as any other field sobriety test evidence — a physical act on the part of defendant observed by the officer contributing to the cumulative portrait of defendant — intimating intoxication in the officer's opinion, and thus such evidence was properly admitted. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

—Exclusion.

Magistrate's exclusion of defense witnesses as a discovery sanction for missing the discovery deadline, which severely penalized defendant convicted of DUI, was an abuse of discretion; conviction vacated and case remanded for new trial. *State v. Winson*, 129 Idaho 298, 923 P.2d 1005 (Ct. App. 1996).

—Foundation.

Where State elected to prove the charge of DUI solely with evidence showing an excessive alcohol concentration, defendant failed to provide adequate foundation for evidence of impairment he offered to challenge the alcohol concentration test. *State v. Edmondson*, 125 Idaho 132, 867 P.2d 1006 (Ct. App. 1994).

Expert, uncontroverted, testimony regarding the reliability of a breath test provided an adequate foundation for its admission into evidence. *State v. Charan*, 132 Idaho 341, 971 P.2d 1165 (Ct. App. 1998).

Where compliance with approved procedures for test administration is not shown, it is necessary for trial courts to determine whether foundational standards have been met by alternative means based on the evidence presented in each case. *State v. Charan*, 132 Idaho 341, 971 P.2d 1165 (Ct. App. 1998).

Subsection (4) of this section does not elim-

inate the foundation requirement for the admission of evidence, but merely specifies one means by which the necessary foundation may be established for alcohol concentration tests, thus meeting foundational standards under the state rules of evidence. *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (Ct. App. 1999).

—Foundation.

Defendant did not provide any evidence demonstrating the unreliability of the Alco-Sensor III and failed to show that the proper foundation under Idaho R. Evid. 702 for admission of his blood-alcohol test results was not established; the Alco-Sensor III was approved by the Idaho state police, additionally, the arresting officer testified that the device had been certified, that he followed the procedures required for accurate use of the device, including conducting a calibration check within twenty-four hours of its use, and that he was certified by the state as a specialist and an instructor in its operation. *State v. Alford*, — Idaho —, 83 P.3d 139 (Ct. App. 2004).

—Held Sufficient.

Where arresting officer testified that he detected the odor of alcohol when he stopped defendant, and where defendant was unable to successfully complete several field sobriety tests, the evidence was sufficient, albeit circumstantial, to establish a discernible impairment related to defendant's ability to drive, and thus was sufficient to support a finding that defendant had been driving under the influence of alcohol. *State v. Bronnenberg*, 124 Idaho 67, 856 P.2d 104 (Ct. App. 1993).

Evidence of the defendant's driving behavior and law enforcement testimony as to her impairment and the results of a urinalysis constituted substantial, competent evidence to support the jury's guilty verdict. *State v. Lesley*, 133 Idaho 23, 981 P.2d 748 (Ct. App. 1999).

There was sufficient evidence from which the jury could reasonably conclude that defendant's ability to drive was impaired by the influence of alcohol where two officers testified that defendant smelled of alcohol, exhibited poor balance and slurred speech, had watery and bloodshot eyes, and nearly collided with the officers' car when he was backing out of the parking lot of a bar. *State v. Mace*, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000).

—Impeachment.

A defendant charged with driving under the influence by proof of excessive blood alcohol content is entitled to offer any competent evidence tending to impeach the results of the evidentiary tests admitted against him; thus, a defendant may introduce evidence of his

blood alcohol content, or other direct or circumstantial evidence, to show a disparity between such evidence and the results produced by the chemical testing, so as to give rise to an inference that the prosecution's test results were defective. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Excluded evidence of DUI defendant's blood alcohol level and its relationship to his breath alcohol content specifically contradicted the results of the tests admitted against him, and assuming the jury believed defendant's testimony regarding his alcohol consumption, the excluded testimony would have demonstrated that his alcohol concentration was lower than that shown by the intoximeter, and consequently would have permitted the jury to doubt the accuracy of the state's evidence. Consequently, the exclusion of this testimony may have contributed to a jury finding that defendant was driving while having an alcohol content of .10 percent or more, and the error in excluding impeaching evidence, as it related to the reliability of the breath test results, reasonably could have affected the ultimate outcome of this case; thus, the judgment of conviction was vacated and the case remanded for a new trial. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

In a prosecution for driving while under the influence, where the state has alleged that the defendant was driving while having an alcohol content of .10 percent or more as shown by analysis of his blood, breath or urine, evidence of a contradictory alcohol content, otherwise proper, is admissible for the purpose of impeaching the results of the evidentiary tests submitted by the state. The probative weight to be accorded to such testimony is left to the jury as trier of the facts, as is the weight to be accorded other evidence in the case. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Where defendant sought to introduce evidence of his blood alcohol concentration, and its relationship to the level of alcohol in his breath, showing an alcohol concentration of less than .10 percent, such evidence was "relevant" within the meaning of IRE 401, and admissible for the purpose of discrediting the results of the state's breath test. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

The evidence of a prior DUI conviction was relevant to directly impeach and contradict defendant's testimony that he did not engage in that type of behavior when he said in his testimony, "I don't drink and drive." *State v. Mace*, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000).

—Measuring Scientific Reliability.

The appropriate test for measuring the scientific reliability of evidence is I.R.E. 702.

State v. Gleason, 123 Idaho 62, 844 P.2d 691 (1992).

While *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991) is authoritative on the issue of the scientific reliability of the horizontal gaze nystagmus test (HGN) evidence, it is not authority for the appropriate test against which such scientific reliability is to be measured. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

—Relevance.

Because evidence that is relevant to the impairment method of proof under this section is not necessarily relevant to the per se method, the defendant's assertion that his speech was not slurred and his clothes were not disheveled when he was stopped for speeding did not affect the police officer's reasonable suspicion, based upon the detection of an odor of alcohol, that the defendant was driving under the influence. *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), cert. denied, 529 U.S. 1038, 120 S. Ct. 1533, 146 L. Ed. 2d 348 (2000).

Felony DUI.

The elements of felony driving under the influence are limited to whether defendant drove or was in actual physical control of his car, while under the influence of alcohol or other intoxicating substances, and that he had pled or been found guilty of at least two violations of this section within the previous five years. These facts were easily, clearly, and honestly ascertained by the police in connection with defendant's arrest. *State v. Zubizarreta*, 122 Idaho 823, 839 P.2d 1237 (Ct. App. 1992).

A plain interpretation of the words chosen by the legislature in § 18-8005(7) evidences an intent that a pre-1992 felony DUI conviction may properly be used to enhance a post-1992 DUI charge to a felony. *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000).

Field Sobriety Tests.

Field sobriety tests are the least intrusive means reasonably available to verify or dispel in a short period of time a police officer's suspicion that the driver is in violation of this section. *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), cert. denied, 529 U.S. 1038, 120 S. Ct. 1533, 146 L. Ed. 2d 348 (2000).

Fourth Amendment Stop.

Substantial evidence was presented in the record that when the officers approached the car, it was already stopped on a public street. There was no sign of authority or force to restrict defendant's movement beyond the uniforms the officers wore and the fact that they wanted to talk to defendant. Thus, there was no Fourth Amendment "stop" under the

United States Constitution. *State v. Jordan*, 122 Idaho 771, 839 P.2d 38 (Ct. App. 1992).

Motion to suppress evidence denied where defendant had voluntarily pulled over and stopped his car partially on the road and police officer pulled behind to see if driver was all right and saw open beer bottles inside vehicle. *State v. Mireles*, 133 Idaho 690, 991 P.2d 878 (Ct. App. 1999).

Indictments.

Idaho's driving under the influence (DUI) statute, Idaho Code § 18-8004(1)(a), establishes a crime that may be proved in two distinct ways: (1) by evidence that the defendant's ability to drive was actually impaired by the influence of alcohol, or (2) by evidence that the defendant was driving with an alcohol concentration of 0.08 or more as determined by analysis of blood, urine or breath. The State, in its charging instrument, may elect to proceed against the defendant under either or both theories of proof. *State v. Robinett*, — Idaho —, — P.3d —, 2004 Ida. App. LEXIS 2 (Ct. App. Jan. 7, 2004).

Instructions.

The trial court did not err in giving an instruction stating, in part, that one of the elements of a driving under the influence charge is that the act was committed while the defendant had 0.10 percent or more, by weight, of alcohol in his blood. *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987).

Where defendant was arrested for DUI and driving without privileges where she attempted to move a vehicle involved in an accident and in which she had been a passenger, out of the intersection, there was no evidence to support an instruction on "threats or menaces"; an assertion of justification or evidence of justification does not support a requested instruction of "threat or menace." *State v. Eastman*, 122 Idaho 87, 831 P.2d 555 (1992).

In prosecution for DUI, jury was properly instructed on the elements of driving under the influence where instruction clearly distinguished the "degree of intoxication" to inform the jury that they need not discern some magic number to represent defendant's state and glean from it the conclusion of driving under the influence, but rather the court's reference to "degree of intoxication" denoted a question of fact as to whether the defendant consumed sufficient alcoholic beverage to thrust him into the realm of the continuum that represented persons whose ability to drive was influenced or affected by alcohol. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

The proper jury instruction for the crime of DUI is that the driver need not be shown to have been in any particular degree or state of

intoxication, but only to have consumed intoxicating liquor to such extent as to influence or affect his ability to drive. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

The term "judgment" should be avoided in jury instructions in DUI prosecutions. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

Where jury instructions in case clearly required jury to find a causal relationship between alleged DUI and the accident, jury instructions adequately covered the Glanzman requirement that defendant's consumption of alcohol affected her driving and although a more specific instruction would have been preferable, the instructions, as a whole, fairly and accurately reflected the elements of vehicular manslaughter. *State v. Thomas*, 128 Idaho 907, 920 P.2d 927 (Ct. App. 1996).

—Harmless Error.

While plaintiff's alcohol consumption was relevant in considering his comparative negligence, court's instruction improperly defined "under the influence" suggesting to the jury that if plaintiff's mental abilities were impaired he must have been "under the influence"; however, any error in giving the instruction was harmless because the trial court did not instruct the jury that DUI was negligence per se. *Dabestani ex rel. Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998).

—Improper.

Defendant's proposed jury instructions which dealt with procedures under subsection (4) of this section that must be followed prior to the administration of the breathalyzer test in order to meet the foundational requirements necessary to have the test results admitted at trial were improper because they contained matters that are not so much legal principles as factual information, and because they attempted to instruct the jury on a legal standard which was inapplicable to the jury's function as the trier of fact. *State v. Ward*, 135 Idaho 400, 17 P.3d 901 (Ct. App. 2001).

—Per Se Standard.

When the state introduced into evidence two test results showing an alcohol concentration of .10 percent, those results satisfied the requirement for prosecution under the per se standard described in this section; therefore, the jury instruction was an accurate statement of the law as applied to the facts of the case. *State v. Barker*, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992).

—Uncontradicted Evidence.

Where defendant testified to disputed facts, offered by defendant to contradict inference raised by the state's evidence, that defendant had been driving while under the influence of alcohol, defendant's testimony did not consti-

tute "uncontradicted evidence" and a requested instruction on uncontradicted evidence was not warranted by the evidence. *State v. Bronnenberg*, 124 Idaho 67, 856 P.2d 104 (Ct. App. 1993).

Intoximeter.

The Department of Health and Welfare has approved the Intoximeter with the Taguchi cell deactivated. Any deficiencies in the accuracy of the measurement of ethyl alcohol that are occasioned by the lack of a Taguchi cell may be attacked by cross-examination or by independent evidence. *State v. Wilson*, 116 Idaho 771, 780 P.2d 93, rehearing denied, 117 Idaho 493, 788 P.2d 1316 (1989).

The Intoximeter #3000, with the Taguchi cell deactivated, was approved by the Department of Health and Welfare at the time a DUI defendant was tested and was not required to be "certified." *State v. Wilson*, 116 Idaho 771, 780 P.2d 93, rehearing denied, 117 Idaho 493, 788 P.2d 1316 (1989).

In criminal case where defendant was charged with driving under the influence in violation of this section and § 18-8005(3), expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses and their opinions were properly admitted into evidence. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

The Intoximeter 3000 with the Taguchi cell deactivated was not required to be certified by the Department of Health and Welfare, and was approved by the Department for use as a direct testing instrument; any deficiencies in the accuracy of the measurement of ethyl alcohol that are occasioned by the lack of a Taguchi cell may be attacked by cross-examination or by independent evidence. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

While scientific acceptance of the Intoximeter 3000 is well established in Idaho, use of test results from the Intoximeter 3000 in the courts of this state remains subject to proper foundation and evidence being presented. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

In prosecution under this section where magistrate ordered that defendant's expert witness be given access to the Intoximeter 3000 to perform experiments in preparation for his defense, but the expert was given access to the equipment for only 30 minutes on the morning of the trial, since defendant made no objection to the trial court to preserve this issue, thus limiting review to a determination of whether there was fundamental error, and there was no such error where review of the expert's testimony at trial gave no indication that his limited access to the equipment impaired his ability to testify

at trial. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

Nothing in the operator's training manual for using the Intoximeter 3000 expressly mandates that only a certified officer can observe the subject for the required 15 minutes before administration of the Intoximeter test; therefore, observations of the arresting officer for the 15-minute interval was sufficient. *State v. Bradley*, 120 Idaho 566, 817 P.2d 1090 (Ct. App. 1991).

Magistrate erred by instructing jury that the Intoxilyzer 5000 had been approved by the State of Idaho. Such instruction commented on the legal determination of adequate foundation which is not properly an issue before the jury and implied that test was accurate. DUI conviction reversed and case remanded for new trial. *State v. Winson*, 129 Idaho 298, 923 P.2d 1005 (Ct. App. 1996).

Jurisdiction.

Where, in prosecution of an Indian arrested within Indian country for driving under the influence of alcohol, the defendant failed to call to the court's attention any theory of constitutional or federal law which would deny Congress the power to regulate the operation of motor vehicles by Indians while in Indian country — or to pass such regulatory power to the states, the magistrate properly exercised jurisdiction over the action. *State v. Fanning*, 114 Idaho 646, 759 P.2d 937 (Ct. App. 1988).

A non-Indian driving under the influence on a road within the boundaries of a reservation is not committing a crime against an Indian or the general Indian populace. As such, the State of Idaho has jurisdiction to prosecute defendant. *State v. Snyder*, 119 Idaho 376, 807 P.2d 55 (1991).

State had jurisdiction over an enrolled member of an Indian tribe for the offense of driving while under the influence of alcohol on public roads and highways within an Indian reservation located in the State and the district court properly exercised jurisdiction over the matter. *State v. Warden*, 127 Idaho 763, 906 P.2d 133 (1995).

Jury Trial.

—Waiver.

Where any waiver of a jury trial by the defendant's counsel in prosecution for driving under the influence resulted from confusion and misunderstanding, no waiver was included in the court's minutes, and no waiver was personally entered by the defendant, the record did not demonstrate an express waiver by the defendant of his right to a jury trial, and absent an express waiver by the defendant, the court erred in proceeding with the trial. *State v. Wheeler*, 114 Idaho 97, 753 P.2d 833 (Ct. App. 1988).

Legislative Intent.

A violation of this section is committed by a person when he or she is driving or is in actual physical control of a motor vehicle and is either (a) under the influence of alcohol, drugs or any other intoxicating substances, or (b) has an alcohol concentration of 0.10 or more. The state need not prove that the person was actually impaired by alcohol, but merely that the analysis of blood, urine, or breath had established an alcohol concentration of 0.10 or more. By so structuring the drunk driving statute, the legislature was expressing its intent that prosecutions for drunk driving may be grounded in a per se 0.10 alcohol concentration test, rather than in complicated proof over the level of impairment of any particular individual. *State v. Nelson*, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

Lesser Included offense.

An error will be considered harmless if the appellate court finds beyond a reasonable doubt that the jury would have reached the same result in the absence of the error, and where parties maintained that issue before the court was whether inattentive driving constituted a lesser included offense of misdemeanor DUI, it was not necessary to address the issue as it was clear that the result, a conviction of defendant for DUI, would have been the same regardless of whether or not the requested instruction of inattentive driving had been given. *State v. Curtis*, 130 Idaho 525, 944 P.2d 122 (Ct. App. 1996).

Where defendant was charged with and convicted of operating a vehicle while under the influence of an alcoholic beverage, his argument that the magistrate judge erred in refusing to instruct the jury on the offense of inattentive driving as a lesser included offense of the crime charged, was without merit as under the statutory theory and under the pleading theory inattentive driving is not a lesser included offense of driving under the influence. *State v. Curtis*, 130 Idaho 522, 944 P.2d 119 (1997).

Miranda Warning.

Where state trooper questioned defendant with regard to DUI offense without first placing him under arrest, defendant was not entitled to Miranda warnings. *State v. Pilik*, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996).

Motor Vehicle.

The term "motor vehicle" as used in this section encompasses motorcycles. *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988).

Since a snowmobile is a specific type of motor vehicle, permitted under certain circumstances to be operated on highways or roadways, it should be treated as a motor

vehicle for purposes of the application of this section. *State v. Barnes*, 133 Idaho 378, 987 P.2d 290 (1999).

Nature of Impairment.

Because the offense is "driving under the influence," it is essential that the impairment be of a physical or mental function that relates to one's ability to drive. It is error to instruct a jury that a defendant may be convicted upon evidence of an impairment which, though noticeable and caused by the consumption of alcohol, would not impair the ability to drive. *State v. Andrus*, 118 Idaho 711, 800 P.2d 107 (Ct. App. 1990).

No Quantity Requirement.

This section does not require that a driver have a certain quantity of drugs in his system in order to be guilty of driving under the influence. *State v. Lesley*, 133 Idaho 23, 981 P.2d 748 (Ct. App. 1999).

Nonforensic Evidence of Blood Alcohol Concentration.

The trial court erred in excluding nonforensic evidence of defendant's blood alcohol concentration and its correlation to the level of alcohol present in his breath; this evidence was relevant and admissible for the purpose of impeaching the accuracy of the state's breath test results. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Observation of Defendant.

Where officer who administered a breath test did not "closely observe" defendant for the requisite fifteen-minute period, nor did the state present evidence showing that defendant had been observed by any officer for fifteen minutes preceding the tests, the results of the breath test produced by the Intoximeter 3000 machine were inadmissible. *State v. Utz*, 125 Idaho 127, 867 P.2d 1001 (Ct. App. 1993).

Where the evidence showed that numerous sources of noise, the police officer's hearing impairment, and his position facing away from the defendant, would substantially have impaired his ability to supplement his visual observation with his other senses to insure that nothing occurred that would affect the validity of the breath tests, the magistrate erred in denying defendant's motion to exclude the tests. *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999).

Operation on Indian Reservation.

With regard to the operation of motor vehicles on an Indian reservation, the state's interests in maintaining traffic safety and protecting the traveling public, Indian and nonIndian alike, controls regardless of whether the motor vehicle is being operated on a road maintained by the state or a political subdivision. *State v. Snyder*, 119 Idaho 376, 807 P.2d 55 (1991).

Order of Convictions.

As long as a defendant is found guilty of three or more violations of the provisions of this section, within five years, he has committed a felony, regardless of whether the third violation preceded the second conviction. *State v. Craig*, 117 Idaho 983, 793 P.2d 215 (1990).

Physical Control.

The legislative history of this section does not recognize any distinction between driving and exercising actual physical control of a motor vehicle. *State v. Cheney*, 116 Idaho 917, 782 P.2d 40 (Ct. App. 1989).

"Driving" and being in "actual physical control" of a motor vehicle are alternative "circumstances" under which the crime of driving under the influence may be charged. *State v. Cheney*, 116 Idaho 917, 782 P.2d 40 (1989).

Magistrate's finding that intoxicated driver was in "actual physical control of his vehicle" was not clearly erroneous where defendant was found asleep in the vehicle which was parked on the shoulder of the road, the brake lights were on and the engine was running, defendant's lower half of his body was on the driver's side of the front seat and the upper half of his body was resting on the passenger's side of the seat, and his right foot was on the brake. *State v. Woolf*, 120 Idaho 21, 813 P.2d 360 (Ct. App. 1991).

Prescription Drugs.

Lithium is a drug for the purposes of this section and thus, the court did not err by refusing to dismiss or strike the portion of the complaint charging defendant with driving under the influence of drugs; the fact that defendant was legally entitled to take lithium because it had been prescribed to him is not a defense to a charge of driving under the influence of intoxicants. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

Private Property Open to the Public.

Parking lot of bar, where defendant was cited for driving under the influence (DUI), qualifies as "private property open to the public," within the meaning of subdivision (1)(a) of this section; parking lot of bar was maintained for the use of any members of the public who wanted to patronize the business or for members of the public who did not want to patronize the bar but, for example, wanted to turn their vehicles around. *State v. Gibson*, 126 Idaho 256, 881 P.2d 551 (Ct. App. 1994).

Since there is a close interaction between Title 49 statutes and similar statutory provisions in Title 18, the definition in section 49-117(16) is applicable to the phrase "private property open to the public" used in this section. *State v. Knott*, 132 Idaho 476, 974 P.2d 1105 (1999).

Where the defendant was on a private res-

idential driveway at the time of his alleged offense, the fact that social guests and persons with business at the residence were permitted to use the driveway did not make it property available to the general public for vehicular traffic or parking, and his conviction for driving under the influence was reversed. *State v. Knott*, 132 Idaho 476, 974 P.2d 1105 (1999).

Probable Cause.

Where police officer, after stopping defendant's automobile, noticed that defendant's eyes were glazed and bloodshot, his speech was slightly slurred and his breath smelled of alcohol, and where the officer also noted that defendant had a tail light out, crossed the fog line twice, and admitted to have had three beers to drink, these facts established probable cause to arrest defendant and to request that he submit to a blood-alcohol test. *State v. Armbruster*, 117 Idaho 19, 784 P.2d 349 (Ct. App. 1989).

In determining whether probable cause to support an arrest existed, the inquiry turns on whether an officer possessed facts which would lead a person of ordinary prudence to entertain an honest belief that the suspect has committed a crime; the officer is entitled to draw reasonable inferences from the facts in his possession, and may base those inferences upon his training and experience as a law enforcement officer. *State v. Webb*, 118 Idaho 99, 794 P.2d 1155 (Ct. App. 1990).

The standards for probable cause are not legal technicalities, but instead are the factual and practical considerations of everyday life upon which reasonable and prudent people act; probable cause deals with the probable consequences of all of the facts considered as a whole, and the determination of probable cause does not require certainty of guilt, but rather the probability that the suspect has committed the offense. *State v. Webb*, 118 Idaho 99, 794 P.2d 1155 (Ct. App. 1990).

Where defendant's car was parked with the engine running, a short distance from a highway in a remote area, where defendant was the sole occupant, and was slumped behind the wheel, where the hour was late and an investigating officer had unusual difficulty in arousing defendant, where defendant demonstrated prolonged confusion, and where defendant was unable to perform sobriety tests, such circumstances warranted the conclusion of a reasonable and prudent person with the officer's experience that defendant was driving while intoxicated. *State v. Webb*, 118 Idaho 99, 794 P.2d 1155 (Ct. App. 1990).

While the record showed deviation from informant's description of the truck of an intoxicated man she witnessed threatening teenagers with a gun and the defendant's

truck, the description was reasonably comparable to justify the stop of defendant's vehicle, which lead to his DUI arrest, based on reasonable and articulable suspicion; order denying motion to suppress affirmed. *State v. Etherington*, 129 Idaho 463, 926 P.2d 1310 (Ct. App. 1996).

An officer may not arrest a person for driving after using a non-narcotic drug, such as marijuana, without probable cause to believe the person's ability to drive safely is impaired and, therefore, an officer did not have probable cause to arrest the defendant where the officer's responses and descriptions of the defendant's behavior revealed that the defendant's driving and comportment did not evidence any impairment. *United States v. Patzer*, 277 F.3d 1080 (9th Cir. 2002).

Standard required for transporting an individual to a law enforcement building or hospital for breath, urine, or blood testing, whether "probable cause" or "legal cause," was satisfied where the officer observed defendant driving ten miles per hour in excess of the twenty-five-mile-per-hour speed limit, detected a strong odor of alcohol on his breath, observed that he had bloodshot eyes and dilated pupils, and was aware that defendant had refused to take field sobriety tests which could have confirmed or dispelled the suspicion of intoxication. *Thompson v. State* (In re Thompson), 138 Idaho 512, 65 P.3d 534 (Ct. App. 2003).

Reasonable Suspicion.

A police officer is only required to possess reasonable suspicion that a person is driving in violation of this section before field sobriety tests may be administered. *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), cert. denied, 529 U.S. 1038, 120 S. Ct. 1533, 146 L. Ed. 2d 348 (2000).

When an officer suspects that the driver of a lawfully stopped vehicle is driving while under the influence he may order him out of the vehicle. *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), cert. denied, 529 U.S. 1038, 120 S. Ct. 1533, 146 L. Ed. 2d 348 (2000).

Because the deputy's observations provided the reasonable suspicion necessary for a lawful traffic stop under § 49-1401(3) and § 49-630(1), defendant's motion to suppress the evidence of his intoxication was correctly denied. *State v. Anderson*, 134 Idaho 552, 6 P.3d 408 (Ct. App. 2000).

When the officer saw that one of the headlights on the vehicle defendant was driving was on while the other was not, he had reasonable cause to believe defendant was operating a vehicle in violation of § 49-902(1), which is an infraction pursuant to § 49-905, and an officer may stop a vehicle to investigate possible criminal behavior if there is

articulable and reasonable suspicion that the vehicle is being driven contrary to traffic laws. *State v. Evans*, 134 Idaho 560, 6 P.3d 416 (Ct. App. 2000).

Defendant's motion to suppress was properly denied where the officer's observations of unusual activity sufficiently corroborated the radio dispatch to provide the requisite reasonable suspicion to make an investigatory stop. *State v. Hankey*, 134 Idaho 844, 11 P.3d 40 (2000).

The odor of alcohol and defendant's admission that he had had three or four drinks was sufficient evidence, based on the totality of the circumstances, to support a reasonable, articulable suspicion that defendant was in violation of this section, and the officer was justified in requiring defendant to exit his vehicle and perform field sobriety tests. *State v. Nelson*, 134 Idaho 675, 8 P.3d 670 (Ct. App. 2000).

Refusal to Take Test.

Where defendant agreed to take a breathalyzer test only on the condition that the police administering the test remove his handcuffs, and the police refused and defendant did not take the test, defendant's conditional consent to take a test to determine blood alcohol content was considered to be a refusal for the purpose of determining whether his driver's license should be revoked under I.C. § 18-8002(4). *Goerig v. State*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

The requirement contained in subsection (3) of § 18-8002 that a motorist suspected of driving while under the influence be advised of the consequences of refusal did not create a right to refuse the test or to withdraw consent. *State v. Burris*, 125 Idaho 289, 869 P.2d 1384 (Ct. App. 1994).

Intermediate appellate decision of the district court reversing an order of the magistrate granting the driver's motion to set aside the magistrate's previous order suspending his driver's license, was proper where, assuming the general applicability of the Idaho Rules of Civil Procedure to license suspension proceedings by virtue of I.M.C.R. 9.2(e), a conflict remained between I.M.C.R. 9.2(b) and I.R.C.P. 60(b)(1); because I.M.C.R. 9.2(b) was the more specific rule, it controlled over the more general I.R.C.P. 60(b)(1) and therefore, I.R.C.P. 60(b)(1) was not available to remedy the driver's untimely request for a show cause hearing. *Hansen v. State* (In re Hansen), 138 Idaho 865, 71 P.3d 464 (Ct. App. 2003).

Request for Independent Test.

—Access to Phone.

Where defendant after submitting to the BAC test and having the standard § 18-8002 Advisory Form read to him failed to assert his right to an independent BAC test his consti-

tutional right to procedural process was not violated by his not having been given access to a phone, since such access at this point in the detention is the mechanism through which a DUI detainee executes his right to a second test and once the request for the second test is made the state may not interfere with or deny access to a telephone to arrange for such a test, but if no request is made access to a phone is not necessary. *State v. Shelton*, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

Request for Test by Defendant.

Where in prosecution for driving under the influence defendant requested that he be allowed to obtain a blood test and the police officer told him that he would have to wait until after the officer was finished booking him, and when officer finished and offered to take defendant for test, defendant declined and indicated that he did not feel well and wanted to go home, in essence, defendant withdrew his request for the test, and it was because of this that no test was obtained and thus magistrate properly concluded there was no basis for suppressing the test results or dismissing the charges. *State v. Greathouse*, 119 Idaho 732, 810 P.2d 266 (Ct. App. 1991).

Rules and Regulations.

This section has provided a showing that the department of law enforcement adopted rules and regulations pertaining to the administration of alcohol concentration tests toward implementation of the statute; the court is empowered to take judicial notice of these rules and regulations. *State v. Howell*, 122 Idaho 209, 832 P.2d 1144 (Ct. App. 1992).

Sentence.

The district court did not abuse its sentencing discretion where it considered defendant's extensive criminal background of five felonies and one misdemeanor, and emphasized the court's concern for the protection of society from the harm that could result from his conduct, and the court considered defendant's drug and alcohol problem. *State v. Hoak*, 120 Idaho 415, 816 P.2d 371 (Ct. App. 1991).

The 15-year indeterminate part of defendant's sentences was reasonable in light of his numerous prior alcohol-related driving offenses and his extensive history of repetitive unlawful behavior. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

The judge fairly considered each of the sentencing factors in that he noted the defendant undoubtedly had been an outstanding worker who could be a productive member of society but for his alcohol and glue addictions; the protection of society was properly considered to be of primary importance in arriving at an appropriate sentence; defendant was a longtime alcoholic; he had undergone counsel-

ing and treatment; he had been given probation, paid fines and been incarcerated several times, and nothing had worked to stop his driving while intoxicated; and no short-term rehabilitative program had been shown to be effective; therefore the five-year minimum period of incarceration was reasonable for the crime of DUI and aggravated assault. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

Defendant had been convicted of driving under the influence on seven occasions, three of them charged as felonies; defendant's current DUI was committed while he was still on probation for a previous DUI conviction for which the district court ordered a four-year unified sentence with one year fixed where the sentence was suspended and defendant was placed on probation and ordered to serve one year in jail; and defendant's criminal record also included a conviction for delivery of a controlled substance; therefore defendant's sentence of one year's fixed confinement and four years indeterminate is reasonable in light of the nature of the crimes he committed and his character as revealed by his extensive criminal history of alcohol-and-drug-related offenses and defendant failed to establish that the district court abused its discretion in denying his motion for reduction of his sentence. *State v. Jimenez*, 120 Idaho 753, 819 P.2d 1153 (Ct. App. 1991).

Where defendant had a prior record of seven DUI offenses, numerous traffic offenses involving alcohol, assault and child endangerment, and a perjury conviction in federal court, the District Court did not abuse its discretion in imposing a five-year term, with two years fixed. *State v. Smith*, 120 Idaho 961, 821 P.2d 1016 (Ct. App. 1991).

The district court did not err in imposing a unified sentence of five years, including a two year minimum term of confinement on defendant's felony DUI conviction where the district court was persuaded that defendant's lengthy DUI record, the fact that he had reoffended while released on his own recognizance pending sentencing, and the recommendation of the Jurisdictional Review Committee, all indicated that society would be best protected by denying probation. *State v. Cardona*, 123 Idaho 16, 843 P.2d 166 (Ct. App. 1992).

—Motion to Reduce.

—Timeliness.

Where defendant pled guilty to felony driving under the influence, was sentenced and released on probation, violated his probation and after revocation of probation and execution of sentence only then filed a motion to reduce his sentence, motion was untimely because motion should have been filed as part of the hearing on parole revocation to be

considered as an alternative disposition to revocation, and therefore the court lacked jurisdiction to grant the motion. *State v. Zamarripa*, 120 Idaho 751, 819 P.2d 1151 (Ct. App. 1991).

—Upheld.

At the time defendant was charged with DUI, he was on probation under a suspended sentence for a previous felony DUI and he disclosed that he had been cited a total of 23 times for DUI in the past 22 years; therefore, the court did not abuse its discretion in imposing a sentence of four years, with a two year period of minimum confinement. *State v. Elliot*, 121 Idaho 786, 828 P.2d 349 (Ct. App. 1992).

Where defendant had previously been convicted 24 times of driving while under the influence, the court reasonably concluded that the unified sentence of five years, with four years' minimum period of confinement was necessary in order to minimize the risk of recurrence of the defendant's criminal conduct. *State v. Wildcat*, 123 Idaho 514, 849 P.2d 975 (Ct. App. 1993).

Standards of Proof.

There are two ways of proving a violation of this section: first, by showing under a totality of the evidence that a defendant was driving under the influence, and second by requiring the state to establish that the defendant drove with an alcohol level tested to be .10 percent or more. The magistrate did not err when he denied defendant's motion to force the state to exclusively elect which method of proof the state would use, as such an order would be contrary to the language of this section which uses the disjunctive "or" in its description of the methods of proof allowed to establish the elements of the crime. *State v. Barker*, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992).

Statutory Percentages.

The statutory percentage contained within the definition of the crime of driving under the influence is conclusive, not presumptive, of guilt; driving a vehicle while one has an alcohol concentration of .10% or more is deemed per se to be a violation of the law. *State v. Andrus*, 118 Idaho 711, 800 P.2d 107 (Ct. App. 1990).

Test Results.

This section does not allow for the test result to be determined by the methods of averaging or of arriving at a median. *State v. Mills*, 128 Idaho 426, 913 P.2d 1196 (Ct. App. 1996).

One valid sample constitutes "a test" pursuant to this section and if the blood alcohol content level of a valid sample is less than 0.10, the accused cannot be prosecuted for

driving under the influence under this section. *State v. Mills*, 128 Idaho 426, 913 P.2d 1196 (Ct. App. 1996).

This section does not expressly condition the validity or admissibility of test results on compliance with the test regulations adopted by the administrative agency. *State v. Charan*, 132 Idaho 341, 971 P.2d 1165 (Ct. App. 1998).

Type of Test.

The choice as to which type of evidentiary test for concentration of alcohol, drugs or other intoxicating substances will be requested rests with the police officer, not the defendant. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Although the blood alcohol test must yield a result that can be expressed in terms of whole blood, nothing in this section prohibits testing the blood serum. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

The state presented proof that the Intoximeter 3000 was a test for alcohol concentration approved by the Idaho Department of Health, administered in accordance with its required procedures, thus meeting the authentication condition of this section and no expert testimony establishing the reliability of the testing process was necessary. *State v. Van Sickles*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

Defendant failed to demonstrate that any state police policy was expressed, or that any law or policy was interpreted, by the approval of the Alco-Sensor III; the Idaho Administrative Procedures Act (IAPA) did not apply when the state police approved the methods for determining an individual's alcohol concentration because the state police action approving the use of the Alco-Sensor III was not rulemaking. *State v. Alford*, — Idaho —, 83 P.3d 139 (Ct. App. 2004).

—HGN.

Horizontal gaze nystagmus (HGN) test results are not admissible for all purposes; HGN test results may not be used at trial to establish the defendant's blood alcohol level in the absence of the chemical analysis of the defendant's blood, breath, or urine. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

The state may prove a violation of this section two ways; by establishing blood alcohol content (BAC) of .10 percent or higher, or by circumstantial evidence of impaired driving ability or other readily observable symptoms of intoxication, and a positive horizontal gaze nystagmus (HGN) test in the absence of some form of chemical analysis cannot be used at trial to establish blood alcohol content of .10 percent or above. The theory underlying the HGN test is sound, but HGN test results may only be used to draw certain inferences. As circumstantial evidence of intoxication, a

positive HGN test result alone is not evidence of a certain degree of blood alcohol content. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

In prosecution for DUI, state satisfactorily established police officer's qualifications regarding the administration of the HGN test where such officer had extensive training in traffic accident investigations, including DUI detection and arrest and had attended seminars conducted by doctor who had worked with highway traffic and safety organization to develop reliable field sobriety tests; therefore, officer was competent to testify as an expert on the administration of the test. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Blood-alcohol content.

Construction.

Evidence.

Reasonable grounds.

Sentence.

Termination of pending prosecution.

Blood-Alcohol Content.

In order to apply the per se provision of 1983 statute, the judge or jury need not determine a defendant's blood-alcohol content with precision; rather, the trier of fact need only determine whether the state has proven, beyond a reasonable doubt, that the blood-alcohol content was at least .10%. *State v. Knoll*, 110 Idaho 678, 718 P.2d 589 (Ct. App. 1986).

Construction.

By this section, the legislature sought to prohibit driving while one is influenced by alcohol or drugs; a blood alcohol content of at least .10 percent is proof, according to the legislature, of the influence of alcohol, where the accuracy or reliability of the test is not refuted. Therefore, this section does not create two separate violations—one for driving under the influence and the other for driving with a .10 percent blood alcohol content. *State v. Brown*, 109 Idaho 981, 712 P.2d 682 (Ct. App. 1985).

This section, as enacted in 1983, does not create two wholly separate offenses based upon a purported distinction between blood-alcohol content and the influence of alcohol; rather, it defines a single offense—driving under the influence of alcohol—which may be established per se by proving a blood-alcohol level of .10% or higher, or which may be established by proving the influence of alcohol with circumstantial evidence of impaired driving ability or other observable symptoms of intoxication. *State v. Knoll*, 110 Idaho 678,

The horizontal gaze nystagmus test (HGN) satisfies the test of *Frye v. United States*, 293 F. 1013 for novel scientific evidence because the test is based on a generally accepted theory that persons who are intoxicated exhibit nystagmus. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

Introduction of evidence of a percentage likelihood of intoxication based solely upon a horizontal gaze nystagmus (HGN) test, admissible because defendant neither objected nor moved to strike this evidence, did not constitute prosecutorial misconduct warranting declaration of mistrial or dismissal. *State v. Stevens*, 126 Idaho 822, 892 P.2d 889 (1995).

718 P.2d 589 (Ct. App. 1986).

Evidence.

Where a police officer observed the defendant motorist's erratic driving, saw the motorist exit his vehicle, stagger and walk unsteadily, and detected the odor of alcohol on the motorist's person, there was a sufficient objective basis for the officer to detain the motorist for further investigation; therefore, the motorist's subsequent refusal to submit to a blood-alcohol test supported the district court's determination that the motorist's license was properly suspended. *Mason v. State Dep't of Law Enforcement*, 103 Idaho 748, 653 P.2d 803 (Ct. App. 1982).

The lapse of 47 minutes from commission of the alleged offense until administration of the blood-alcohol test did not trigger a foundational requirement that the test result be related back with supplementary evidence; the test result clearly was relevant to determining guilt, and being relevant, the evidence was admissible and was entitled to whatever weight a judge or jury might have given it if the case had been tried. *State v. Knoll*, 110 Idaho 678, 718 P.2d 589 (Ct. App. 1986).

Reasonable Grounds.

The lawfulness of the defendant's arrest for operating a motor vehicle while under the influence of intoxicating beverages depends upon whether the arresting officer had reasonable cause to believe that the defendant had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating beverages. *Mason v. State Dep't of Law Enforcement*, 103 Idaho 748, 653 P.2d 803 (Ct. App. 1982).

Sentence.

Where the defendant pleaded guilty to a charge of driving while intoxicated (DWI), and a magistrate sentenced him to jail for a period not to exceed six months after consult-

ing a presentence investigation report which showed that defendant had a lengthy record of DWI and related offenses, the district court did not abuse its discretion in failing to modify the sentence despite some evidence to support the defendant's contention that he had taken positive steps to solve his problems with alcohol. *State v. Hughes*, 102 Idaho 703, 639 P.2d 1 (1981).

Termination of Pending Prosecution.

Although the defendant was awaiting prosecution in 1983 for driving under the influence of alcohol when the legislature enacted a new version of § 49-1102 (now repealed), and repealed the old one, the essential elements of

the crime and the permissible methods of proof under the old statute were substantially retained in the new version of § 49-1102; consequently, under the carry-forward theory, this action was excepted from the common law rule requiring termination of the pending prosecution, and the legislative events of 1983 did not bar the defendant's conviction and punishment for driving under the influence. *State v. Nichols*, 110 Idaho 823, 718 P.2d 1261 (Ct. App. 1986). ~

Collateral References. Assimilation, under Assimilative Crimes Act (18 U.S.C.A. § 13), of state statutes relating to driving while intoxicated or under influence of alcohol. 175 A.L.R. Fed. 293.

18-8004A. Penalties — Persons under 21 with less than 0.08 alcohol concentration. — (1) Any person found guilty of a violation of subsection (1)(d) of section 18-8004, Idaho Code, shall be guilty of a misdemeanor; and, for a first offense:

- (a) Shall be fined an amount not to exceed one thousand dollars (\$1,000);
- (b) Shall have his driving privileges suspended by the court for a period of one (1) year, ninety (90) days of which shall not be reduced and during which period absolutely no driving privileges of any kind may be granted. After the period of absolute suspension of driving privileges has passed, the defendant may request restricted driving privileges which the court may allow, if the defendant shows by a preponderance of the evidence that driving privileges are necessary as deemed appropriate by the court;
- (c) Shall be advised by the court in writing at the time of sentencing of the penalties that will be imposed for any subsequent violation of the provisions of this section or any violation of section 18-8004, Idaho Code, which advice shall be signed by the defendant, and a copy retained by the court and another copy retained by the prosecuting attorney;
- (d) Shall be required to undergo an alcohol evaluation and otherwise comply with the requirements of sections 18-8005(9) and 18-8005(12), Idaho Code, as ordered by the court.

(2) Any person who pleads guilty to or is found guilty of a violation of the provisions of subsection (1)(d) of section 18-8004, Idaho Code, who previously has been found guilty of or has pled guilty to a violation of the provisions of section 18-8004(1)(a), (b), (c) or (d), Idaho Code, or any substantially conforming foreign criminal violation, as defined in section 18-8005(8), Idaho Code, notwithstanding the form of the judgment or withheld judgment, is guilty of a misdemeanor; and:

- (a) Shall be sentenced to jail for a mandatory minimum period of five (5) days, as required by 23 U.S.C. section 164, not to exceed thirty (30) days;
- (b) Shall be fined an amount of not less than five hundred dollars (\$500) nor more than two thousand dollars (\$2,000);
- (c) Shall have his driving privileges suspended by the court for a period not to exceed two (2) years, one (1) year of which shall be absolute and shall not be reduced and during which period absolutely no driving privileges of any kind may be granted;

(d) Shall, while operating a motor vehicle, be required to drive only a motor vehicle equipped with a functioning ignition interlock system, as provided in section 18-8008, Idaho Code, following the mandatory one (1) year license suspension period; and

(e) Shall be advised by the court in writing at the time of sentencing of the penalties that will be imposed for subsequent violations of the provisions of this section or section 18-8004, Idaho Code, which advice shall be signed by the defendant, and a copy retained by the court and another copy retained by the prosecuting attorney;

(f) Shall undergo an alcohol evaluation and comply with the other requirements of subsections (9) and (12) of section 18-8005, Idaho Code.

(3) Any person who pleads guilty to or is found guilty of a violation of the provisions of subsection (1)(d) of section 18-8004, Idaho Code, who previously has been found guilty of or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b), (c) or (d), Idaho Code, or any substantially conforming foreign criminal violation, within five (5) years, notwithstanding the form of the judgment or withheld judgment, shall be guilty of a misdemeanor; and:

(a) Shall be sentenced to jail for a mandatory minimum period of ten (10) days, as required by 23 U.S.C. section 164, not to exceed six (6) months;

(b) Shall be fined an amount of not less than one thousand dollars (\$1,000) nor more than two thousand dollars (\$2,000);

(c) Shall surrender his driver's license or permit to the court;

(d) Shall have his driving privileges suspended by the court for a mandatory minimum period of one (1) year, during which period absolutely no driving privileges of any kind may be granted, or until such person reaches the age of twenty-one (21) years, whichever is greater; and

(e) Shall, while operating a motor vehicle, be required to drive only a motor vehicle equipped with a functioning ignition interlock system, as provided in section 18-8008, Idaho Code, following the mandatory one (1) year license suspension period; and

(f) Shall undergo an alcohol evaluation and comply with all other requirements imposed by the court pursuant to sections 18-8005(9) and 18-8005(12), Idaho Code.

(4) All provisions of section 18-8005, Idaho Code, not otherwise in conflict with or provided for in this section shall apply to any sentencing imposed under the provisions of this section.

(5) A person violating the provisions of section 18-8004(1)(d), Idaho Code, may be prosecuted under title 20, Idaho Code. [I.C., § 18-8004A, as added by 1994, ch. 422, § 2, p. 1322; am. 1997, ch. 158, § 2, p. 457; am. 1999, ch. 246, § 1, p. 633; am. 2000, ch. 247, § 1, p. 692; am. 2002, ch. 335, § 1, p. 950.]

Compiler's notes. Section 3 of S.L. 1997 ch. 158 is compiled as § 67-7034.

Section 2 of S.L. 2000, ch. 247 is compiled as § 18-8004C.

Sec. to sec. ref. This section is referred to in §§ 18-8001 and 18-8002A.

Collateral References. Validity, construction, and application of statute permitting forfeiture of motor vehicle for operating while intoxicated. 89 A.L.R.5th 539.

18-8004C. Excessive alcohol concentration — Penalties. — Notwithstanding any provision of section 18-8005, Idaho Code, to the contrary:

(1) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), Idaho Code, for the first time, but who has an alcohol concentration of 0.20, as defined in section 18-8004(4), Idaho Code, or more, as shown by an analysis of his blood, breath or urine by a test requested by a police officer, shall be guilty of a misdemeanor; and:

(a) Shall be sentenced to jail for a mandatory minimum period of not less than ten (10) days the first forty-eight (48) hours of which must be consecutive, and may be sentenced to not more than one (1) year;

(b) May be fined an amount not to exceed two thousand dollars (\$2,000);

(c) Shall be advised by the court in writing at the time of sentencing, of the penalties that will be imposed for subsequent violations of the provisions of this section and violations of section 18-8004, Idaho Code, which advice shall be signed by the defendant, and a copy retained by the court and another copy retained by the prosecuting attorney;

(d) Shall surrender his driver's license or permit to the court;

(e) Shall have his driving privileges suspended by the court for an additional mandatory minimum period of one (1) year after release from confinement, during which one (1) year period absolutely no driving privileges of any kind may be granted; and

(2) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004, Idaho Code, and who has an alcohol concentration of 0.20, as defined in section 18-8004(4), Idaho Code, or more, as shown by an analysis of his blood, breath or urine by a test requested by a police officer, and who previously has been found guilty of or has pled guilty to one (1) or more violations of section 18-8004, Idaho Code, in which the person had an alcohol concentration of 0.20 or more, or any substantially conforming foreign criminal violation wherein the defendant had an alcohol concentration of 0.20 or more, or any combination thereof, within five (5) years, notwithstanding the form of judgment or withheld judgment shall be guilty of a felony; and:

(a) Shall be sentenced to the custody of the state board of correction for not to exceed five (5) years; provided that notwithstanding the provisions of section 19-2601, Idaho Code, should the court impose any sentence other than incarceration in the state penitentiary, the defendant shall be sentenced to the county jail for a mandatory minimum period of not less than thirty (30) days; and further provided that notwithstanding the provisions of section 18-111, Idaho Code, a conviction under this section shall be deemed a felony;

(b) May be fined an amount not to exceed five thousand dollars (\$5,000);

(c) Shall surrender his driver's license or permit to the court; and

(d) Shall have his driving privileges suspended by the court for a mandatory minimum period of one (1) year after release from imprisonment, and may have his driving privileges suspended by the court for not to exceed five (5) years after release from imprisonment, during which time he shall have absolutely no driving privileges of any kind; and

(e) Shall, while operating a motor vehicle, be required to drive only a motor vehicle equipped with a functioning ignition interlock system, as

provided in section 18-8008, Idaho Code, following the mandatory license suspension period.

(3) All the provisions of section 18-8005, Idaho Code, not in conflict with or otherwise provided for in this section, shall apply to this section.

(4) Notwithstanding any other provision of law, any evidence of conviction under this section shall be admissible in any civil action for damages resulting from the occurrence. A conviction for the purposes of this section means that the person has pled guilty or has been found guilty, notwithstanding the form of the judgment or withheld judgment. [I.C., § 18-8004C, as added by 1994, ch. 421, § 1, p. 1316; am. 2000, ch. 247, § 2, p. 692.]

Compiler's notes. Section 1 of S.L. 2000, ch. 247 is compiled as § 18-8004A.

Sec. to sec. ref. This section is referred to in §§ 18-8001 and 18-8002A.

ANALYSIS

Blood alcohol content.

Corpus delicti.

Blood Alcohol Content.

Because § 18-8004C gave importance to blood alcohol concentration evidence even if there was other overwhelming evidence that a defendant was driving under the influence of alcohol, and as it was not the prerogative of the defendant to determine what evidence the State could gather to support his prosecution, defendant's argument that a forcible blood draw was unreasonable because it was unnecessary for his prosecution lacked merit. State

v. Worthington, 138 Idaho 470, 65 P.3d 211 (Ct. App. 2002).

Corpus Delicti.

Defendant's conviction of driving under the influence, Idaho Code §§ 18-8004(1)(a) and 18-8004C, was proper, as the State met its burden of showing corpus delicti independently from defendant's extrajudicial admissions by providing sufficient evidence that defendant was driving while intoxicated, and because the convictions were supported by sufficient evidence, based upon defendant's statements and a blood alcohol test result. State v. Roth, 138 Idaho 820, 69 P.3d 1081 (Ct. App. 2003).

Collateral References. Validity, construction, and application of statute permitting forfeiture of motor vehicle for operating while intoxicated. 89 A.L.R.5th 539.

18-8005. Penalties. — (1) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a) or (5), Idaho Code, for the first time is guilty of a misdemeanor; and, except as provided in section 18-8004C, Idaho Code:

- (a) May be sentenced to jail for not to exceed six (6) months;
- (b) May be fined an amount not to exceed one thousand dollars (\$1,000);
- (c) Shall be advised by the court in writing at the time of sentencing of the penalties that will be imposed for subsequent violations of the provisions of section 18-8004, Idaho Code, which advice shall be signed by the defendant, and a copy retained by the court and another copy retained by the prosecuting attorney; and
- (d) Shall have his driving privileges suspended by the court for a period of thirty (30) days which shall not be reduced and during which thirty (30) day period absolutely no driving privileges of any kind may be granted. After the thirty (30) day period of absolute suspension of driving privileges has passed, the defendant shall have driving privileges suspended by the court for an additional period of at least sixty (60) days, not to exceed one hundred fifty (150) days during which the defendant may request restricted driving privileges which the court may allow, if the defendant shows by a preponderance of the evidence that driving privileges are necessary for his employment or for family health needs.

(2) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(b), Idaho Code, for the first time is guilty of a misdemeanor and subject to:

- (a) The provisions of section 18-8005(1)(a), (b) and (c), Idaho Code; and
- (b) The provisions of section 49-335, Idaho Code.

(3) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(c), Idaho Code, for the first time, is guilty of a misdemeanor and is subject to:

- (a) The provisions of section 18-8005(1)(a), (b) and (c), Idaho Code; and
- (b) The provisions of section 49-335, Idaho Code.

(4) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty of or has pled guilty to a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, or any substantially conforming foreign criminal violation within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), and except as provided in section 18-8004C, Idaho Code, is guilty of a misdemeanor; and, except as provided in section 18-8004C, Idaho Code:

(a) Shall be sentenced to jail for a mandatory minimum period of not less than ten (10) days the first forty-eight (48) hours of which must be consecutive, and five (5) days of which must be served in jail, as required by 23 U.S.C. section 164, and may be sentenced to not more than one (1) year, provided however, that in the discretion of the sentencing judge, the judge may authorize the defendant to be assigned to a work detail program within the custody of the county sheriff during the period of incarceration;

(b) May be fined an amount not to exceed two thousand dollars (\$2,000);

(c) Shall be advised by the court in writing at the time of sentencing, of the penalties that will be imposed for subsequent violations of the provisions of section 18-8004, Idaho Code, which advice shall be signed by the defendant, and a copy retained by the court and another copy retained by the prosecuting attorney;

(d) Shall surrender his driver's license or permit to the court;

(e) Shall have his driving privileges suspended by the court for an additional mandatory minimum period of one (1) year after release from confinement, during which one (1) year period absolutely no driving privileges of any kind may be granted; and

(f) Shall, while operating a motor vehicle, be required to drive only a motor vehicle equipped with a functioning ignition interlock system, as provided in section 18-8008, Idaho Code, following the one (1) year mandatory license suspension period.

(g) If the person has pled guilty or was found guilty for the second time within five (5) years of a violation of the provisions of section 18-8004(1)(b) or (c), Idaho Code, then the provisions of section 49-335, Idaho Code, shall apply.

(5) Except as provided in section 18-8004C, Idaho Code, any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty of

or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, or any substantially conforming foreign criminal violation, or any combination thereof, within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony; and

(a) Shall be sentenced to the custody of the state board of correction for not to exceed five (5) years; provided that notwithstanding the provisions of section 19-2601, Idaho Code, should the court impose any sentence other than incarceration in the state penitentiary, the defendant shall be sentenced to the county jail for a mandatory minimum period of not less than thirty (30) days, the first forty-eight (48) hours of which must be consecutive, and ten (10) days of which must be served in jail, as required by 23 U.S.C. section 164; and further provided that notwithstanding the provisions of section 18-111, Idaho Code, a conviction under this section shall be deemed a felony;

(b) May be fined an amount not to exceed five thousand dollars (\$5,000);

(c) Shall surrender his driver's license or permit to the court; and

(d) Shall have his driving privileges suspended by the court for a mandatory minimum period of one (1) year after release from imprisonment, and may have his driving privileges suspended by the court for not to exceed five (5) years after release from imprisonment, during which time he shall have absolutely no driving privileges of any kind; and

(e) Shall, while operating a motor vehicle, be required to drive only a motor vehicle equipped with a functioning ignition interlock system, as provided in section 18-8008, Idaho Code, following the mandatory one (1) year license suspension period.

(6) For the purpose of computation of the enhancement period in subsections (4), (5) and (7) of this section, the time that elapses between the date of commission of the offense and the date the defendant pleads guilty or is found guilty for the pending offense shall be excluded. If the determination of guilt against the defendant is reversed upon appeal, the time that elapsed between the date of the commission of the offense and the date the defendant pleads guilty or is found guilty following the appeal shall also be excluded.

(7) Notwithstanding the provisions of subsections (4) and (5) of this section, any person who has pled guilty or has been found guilty of a felony violation of the provisions of section 18-8004, Idaho Code, a felony violation of the provisions of section 18-8004C, Idaho Code, a violation of the provisions of section 18-8006, Idaho Code, a violation of the provisions of section 18-4006 3.(b), Idaho Code, or any substantially conforming foreign criminal felony violation, and within ten (10) years pleads guilty or is found guilty of a further violation of the provisions of section 18-8004, Idaho Code, shall be guilty of a felony and shall be sentenced pursuant to subsection (5) of this section.

(8) For the purpose of subsections (4), (5) and (7) of this section and the provisions of section 18-8004C, Idaho Code, a substantially conforming foreign criminal violation exists when a person has pled guilty to or has been found guilty of a violation of any federal law or law of another state, or any

valid county, city, or town ordinance of another state substantially conforming to the provisions of section 18-8004, Idaho Code. The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court.

(9) Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code, shall undergo, at his own expense, (or at county expense through the procedures set forth in chapters 34 and 35, title 31, Idaho Code,) and prior to the sentencing date, an alcohol evaluation by an alcohol evaluation facility approved by the Idaho department of health and welfare; provided however, if the defendant has no prior or pending charges with respect to the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code, and the court has the records and information required under subsections (10)(a), (b) and (c) of this section or possesses information from other reliable sources relating to the defendant's use or non-use of alcohol or drugs which does not give the court any reason to believe that the defendant regularly abuses alcohol or drugs and is in need of treatment, the court may, in its discretion, waive the evaluation with respect to sentencing for a violation of section 18-8004 or 18-8004C(1), Idaho Code, and proceed to sentence the defendant. The court may also, in its discretion, waive the requirement of an alcohol evaluation with respect to a defendant's violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code, and proceed to sentence the defendant if the court has a presentence investigation report, substance abuse assessment, criminogenic risk assessment, or other assessment which evaluates the defendant's degree of alcohol abuse and need for alcohol treatment conducted within twelve (12) months preceding the date of the defendant's sentencing. In the event an alcohol evaluation indicates the need for alcohol treatment, the evaluation shall contain a recommendation by the evaluator as to the most appropriate treatment program, together with the estimated cost thereof, and recommendations for other suitable alternative treatment programs, together with the estimated costs thereof. The person shall request that a copy of the completed evaluation be forwarded to the court. The court shall take the evaluation into consideration in determining an appropriate sentence. If a copy of the completed evaluation has not been provided to the court, the court may proceed to sentence the defendant; however, in such event, it shall be presumed that alcohol treatment is required unless the defendant makes a showing by a preponderance of evidence that treatment is not required. If the defendant has not made a good faith effort to provide the completed copy of the evaluation to the court, the court may consider the failure of the defendant to provide the report as an aggravating circumstance in determining an appropriate sentence. If treatment is ordered, in no event shall the person or facility doing the evaluation be the person or facility that provides the treatment unless this requirement is waived by the sentencing court, with the exception of federally recognized Indian tribes or federal military installations, where diagnosis and treatment are appropriate and available. Nothing herein contained shall preclude the use of funds authorized pursuant to the provisions of chapter 3, title 39, Idaho Code, for court-ordered alcohol treatment for indigent defendants.

(10) At the time of sentencing, the court shall be provided with the following information:

(a) The results, if administered, of any evidentiary test for alcohol and/or drugs;

(b) A computer or teletype or other acceptable copy of the person's driving record;

(c) Information as to whether the defendant has pled guilty to or been found guilty of violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code, or a similar offense within the past five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s); and

(d) The alcohol evaluation required in subsection (9) of this section, if any.

(11) A minor may be prosecuted for a violation of the provisions of section 18-8004 or 18-8004C, Idaho Code, under chapter 5, title 20, Idaho Code. In addition to any other penalty, if a minor pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c) or 18-8004C, Idaho Code, he shall have his driving privileges suspended or denied for an additional one (1) year following the end of any period of suspension or revocation existing at the time of the violation, or until he reaches the age of twenty-one (21) years, whichever period is greater. During the period of additional suspension or denial, absolutely no driving privileges shall be allowed.

(12) In the event that the alcohol evaluation required in subsection (9) of this section recommends alcohol treatment, the court shall order the person to complete a treatment program in addition to any other sentence which may be imposed, unless the court determines that alcohol treatment would be inappropriate or undesirable, in which event, the court shall enter findings articulating the reasons for such determination on the record. The court shall order the defendant to complete the preferred treatment program set forth in the evaluation, or a comparable alternative, unless it appears that the defendant cannot reasonably obtain adequate financial resources for such treatment. In that event, the court may order the defendant to complete a less costly alternative set forth in the evaluation, or a comparable program. Such treatment shall, to the greatest extent possible, be at the expense of the defendant. In the event that funding is provided for or on behalf of the defendant by an entity of state government, restitution shall be ordered to such governmental entity in accordance with the restitution procedure for crime victims, as specified under chapter 53, title 19, Idaho Code. Nothing contained herein shall be construed as requiring a court to order that a governmental entity shall provide alcohol treatment at government expense unless otherwise required by law.

(13) Any person who is disqualified shall not be granted restricted driving privileges to operate a commercial motor vehicle. [I.C., § 18-8005, as added by 1984, ch. 22, § 2, p. 25; am. 1986, ch. 201, § 1, p. 501; am. 1988, ch. 265, § 564, p. 549; am. 1989, ch. 88, § 62, p. 151; am. 1989, ch. 175, § 1, p. 424; am. 1989, ch. 366, § 2, p. 915; am. 1990, ch. 45, § 45, p. 71; am. 1992, ch. 115, § 40, p. 345; am. 1992, ch. 139, § 1, p. 429; am. 1992, ch. 338, § 1, p. 1011; am. 1993, ch. 272, § 1, p. 909; am. 1994, ch. 148, § 2, p. 336; am. 1994, ch. 421, § 2, p. 1316; am. 1994, ch. 422, § 3, p. 1322; am. 1997, ch. 114, § 1,

p. 284; am. 1999, ch. 80, § 2, p. 227; am. 2000, ch. 240, § 1, p. 670; am. 2000, ch. 247, § 3, p. 692; am. 2003, ch. 286, § 1, p. 773.]

Compiler's notes. This section was amended by three 1994 acts — ch. 148, § 2, ch. 421, § 2, and ch. 422, § 3, all effective July 1, 1994 — which do not appear to conflict and have been compiled together.

The 1994 amendment by ch. 148, § 2, added “, provided however, that in the discretion of the sentencing judge, the judge may authorize the defendant to be assigned to a work detail program within the custody of the county sheriff during the period of incarceration” to the end of subdivision (4)(a).

The 1994 amendment by ch. 421, § 2, added “except as provided in section 18-8004C, Idaho Code” at the end of the introductory paragraph of subsection (1), twice near the end of subsection (4), and at the beginning of subsection (5); near the middle of subsection (7), inserted “a felony violation of the provisions of section 18-8004C, Idaho Code”; in the first sentence of subsection (8), inserted “and the provisions of section 18-8004C, Idaho Code”; in the first sentence of subsection (9), inserted “18-8004C”; in subdivision (10)(c), inserted “18-8004C”; and in subsection (11), inserted “or 18-8004C” in the first and second sentence and substituted “twenty one (21) years” for “eighteen (18) years” in the second sentence.

The 1994 amendment by ch. 422, § 3, substituted “18-8004(1)(a), (b) or (c)” for “18-8004” in subsections (4), (5) and (11); and in the second sentence of subsection (11), substituted “twenty-one (21) years” for “eighteen (18) years.”

Sections 563 and 565 of S.L. 1988, ch. 265 are compiled as §§ 18-8001 and 18-8007, respectively.

Section 1 of S.L. 1989, ch. 366 is compiled as § 18-8002.

Sections 39 and 41 of S.L. 1992, ch. 115 are compiled as §§ 18-8005 and 18-8007, respectively.

Section 1 of S.L. 1994, ch. 148 is compiled as § 18-8001.

Section 2 of S.L. 1994, ch. 422 is compiled as § 18-8004C.

Section 1 of S.L. 1999, ch. 80 is compiled as § 18-8002A.

Section 4 of S.L. 2000, ch. 247 is compiled as § 18-8008.

Section 586 of S.L. 1988, ch. 265 provided that the act should take effect on and after January 1, 1989.

Section 47 of S.L. 1990, ch. 45 read: “This act shall be in full force and effect on and after July 1, 1990, with the exception that the provisions within each applicable section of Idaho Code relating to classes of driver’s licenses shall take effect no later than Sep-

tember 1, 1990, as determined by the director of the Idaho transportation department, and until that time, existing laws shall remain in effect.” Approved March 12, 1990.

Sec. to sec. ref. This section is referred to in §§ 18-1502, 18-8001, 18-8002A and 18-8004A.

Rule to sec. ref. This section is referred to in M.C.R., Rule 9.4.

Cited in: State v. Henderson, 114 Idaho 773, 756 P.2d 1057 (1988); Holmes v. Union Oil Co., 114 Idaho 773, 760 P.2d 1189 (Ct. App. 1988); State v. Allbee, 115 Idaho 845, 771 P.2d 66 (Ct. App. 1989); State v. Smith, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991); State v. Garner, 122 Idaho 371, 834 P.2d 888 (Ct. App. 1992); State v. Litz, 122 Idaho 387, 834 P.2d 904 (Ct. App. 1992); State v. Waldie, 126 Idaho 864, 893 P.2d 811 (Ct. App. 1995); State v. Shelton, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

ANALYSIS

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Constitutionality.

The application of the Driving While Under the Influence (DUI) statute enhancement provision did not violate constitutional prohibitions against ex post facto laws, even though the defendant’s prior felony DUI conviction was entered before the enactment of this section. State v. Nickerson, 132 Idaho 406, 973 P.2d 758 (Ct. App. 1999).

Construction.

Subsection (3) (now (5)) of this section must be read to proscribe three guilty pleas or findings of guilt within a five year period. *State v. Bever*, 188 Idaho 80, 794 P.2d 1136 (1990) (decided prior to 1990 amendment).

Subdivision (2)(c) (now (4)(c)) of this section is not intended to provide the defendant with notice, or to create in the defendant a right to such notice, but to achieve the well-established sentencing goal of deterrence. *State v. Nickerson*, 121 Idaho 925, 828 P.2d 1330 (Ct. App. 1992).

In light of the contemporaneous changes to the DUI statutes and the plain language of the provision, subsection (6) of this section must be interpreted to prevent a felony being reduced to a misdemeanor due to the passage of time in awaiting trial or plea. *State v. Pusey*, 128 Idaho 647, 917 P.2d 804 (Ct. App. 1996).

Double Jeopardy.

Defendant's assertion that when he was arrested on the driving under the influence of alcohol (DUI) charge, he was also cited for driving without privileges (DWP) because his license had been suspended as a result of previous violations, and that his plea of guilty and sentence on the DWP offense barred the DUI prosecution was without merit as such circumstances did not constitute double jeopardy. *State v. Flynn*, 127 Idaho 790, 906 P.2d 640 (Ct. App. 1995).

Evidence.

The state provided a sufficient foundation to establish that defendant's blood-alcohol content test was performed by a laboratory or method approved by the Idaho Department of Law Enforcement as required by subsection (4) of § 18-8004. *State v. Uhly*, 121 Idaho 1020, 829 P.2d 1369 (Ct. App. 1992).

Motion to suppress evidence denied where defendant had voluntarily pulled over and stopped his car partially on the road and police officer pulled behind to see if driver was all right and saw open beer bottles inside vehicle. *State v. Mireles*, 133 Idaho 690, 991 P.2d 878 (Ct. App. 1999).

Expert Testimony.

In criminal case where defendant was charged with driving under the influence in violation of § 18-8004 and subsection (3) of this section expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses and their opinions were properly admitted into evidence. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

Failure to Prove Prior Convictions.

Trial court correctly held that prosecution failed to present necessary proof that defen-

dant had been validly convicted of two previous driving under the influence charges within the previous five years; defendant's prior judgment of conviction did not demonstrate on its face that the defendant in that proceeding was informed of his rights as required under I.C.R. 11 and the form of the judgment entered failed to incorporate the information mandated by I.M.C.R. 5. *State v. Mesenbrink*, 115 Idaho 850, 771 P.2d 514 (1989).

Where the state was unable to present anything in the record to establish the existence of prior felonies, the state failed to meet its burden of proving the existence of prior convictions, upon which the state relied to enhance a charge of DUI or DWP from a misdemeanor to a felony. *State v. Coby*, 128 Idaho 90, 910 P.2d 762 (1996).

Felony.

Although defendant was never charged with a "DUI, Second Offense," he was properly charged with a DUI felony where the first judgment of conviction was January 31, 1985, the second judgment of conviction was December 13, 1985, and the third judgment of conviction was October 28, 1988. With all three convictions falling within a five year span of time, the requirements of this section, which states the conditions when a third conviction raises the offense to the felony level, are met. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

Guilty Plea.

In *State v. Carrasco*, 117 Idaho 295, 787 P.2d 281 (1990) the Supreme Court discussed the constitutional requirements which must be met before a court may accept a plea of guilty in a felony case, but the court specifically noted that these requirements apply only to felony cases and that the provisions of I.C. § 19-502 and Rule 6 of the Misdemeanor Criminal Rules continue to be applicable in accepting guilty pleas in misdemeanor cases; therefore, since both of defendant's first and second DUI violations were misdemeanors under this section which prescribes the penalties for driving under the influence, Carrasco is not applicable in this case. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

Harmless Error.

Where, in the first phase of a bifurcated trial, the court erroneously disclosed to the jury that the defendant's DUI offense was charged as a felony, but where the defendant's claim of prejudice was substantially undermined by the fact that evidence that he had a prior criminal conviction came before the jury during defense counsel's examination of a defense witness, that testimony, together with the relative strength of the remaining

evidence offered by both parties, supported a finding that the verdict would have been the same even if the error in the jury instructions had not occurred. *State v. Johnson*, 132 Idaho 726, 979 P.2d 128 (Ct. App. 1999).

Instructions.

—Erroneous.

Magistrate erred by instructing jury that the Intoxilyzer 5000 had been approved by the State of Idaho. Such instruction commented on the legal determination of adequate foundation which is not properly an issue before the jury and implied that test was accurate. DUI conviction reversed and case remanded for new trial. *State v. Winson*, 129 Idaho 298, 923 P.2d 1005 (Ct. App. 1996).

Jury Trial.

In prosecution for driving under the influence, the defendant had a right to a jury trial. *State v. Wheeler*, 114 Idaho 97, 753 P.2d 833 (Ct. App. 1988).

—Informing jury of felony charge.

Although in a driving under the influence (DUI) case where the charge is enhanced to a felony under this section due to the existence of prior convictions the jury should not be informed during the first phase of the trial that the defendant is charged with a felony, and although the district judge erred in using the terms "felony" and "feloniously" in the jury instructions, because the jury was admonished not to speculate as to punishment and the State presented overwhelming evidence that defendant committed the offense charged, there was no reasonable possibility that such error contributed to the conviction and conviction was upheld. *State v. Roy*, 127 Idaho 228, 899 P.2d 441 (1995).

—Waiver.

Where any waiver of a jury trial by the defendant's counsel in prosecution for driving under the influence resulted from confusion and misunderstanding, no waiver was included in the court's minutes, and no waiver was personally entered by the defendant, the record did not demonstrate an express waiver by the defendant of his right to a jury trial, and absent an express waiver by the defendant, the court erred in proceeding with the trial. *State v. Wheeler*, 114 Idaho 97, 753 P.2d 833 (Ct. App. 1988).

Legislative Intent.

The legislature has clearly expressed its intent that a determination of guilt which is followed by an order withholding judgment, although a judgment of conviction might never be entered, is a determination of guilt within the meaning of subsection (4) of this section. *State v. Deitz*, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991).

In enacting subsection (2)(c) (now (4)(c)), the legislature did not intend to create the right to written advice claimed by defendant, nor did it intend the subsection to have the exclusionary remedial effect. *State v. Nickerson*, 121 Idaho 925, 828 P.2d 1330 (Ct. App. 1992).

A plain interpretation of the words chosen by the legislature in subsection (7) of this section evidences an intent that a pre-1992 felony DUI conviction may properly be used to enhance a post-1992 DUI charge to a felony. *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000).

Miranda Warning.

Where state trooper questioned defendant with regard to DUI offense without first placing him under arrest, defendant was not entitled to Miranda warnings. *State v. Pilik*, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996).

Order of Convictions.

As long as a defendant is found guilty of three or more violations of the provisions of § 18-8004, within five years, he has committed a felony regardless of whether the third violation preceded the second conviction. *State v. Craig*, 117 Idaho 983, 793 P.2d 215 (1990) (decided prior to 1990 amendment).

If a defendant is found guilty of two DUI's within five years, that defendant is to be sentenced under subsection (2) (now (4)) of this section regardless of whether the second violation comes before or after the first conviction. *State v. Beach*, 119 Idaho 837, 810 P.2d 1123 (1991).

Penalty Enhancement.

A person whose DUI charge is dismissed pursuant to Idaho's expungement statute, § 19-2604(1), is considered a person who previously has pled guilty or has been found guilty of DUI for purposes of the penalty-enhancing statute, subsection (4) of this section, applicable to repeat DUI offenders. *State v. Deitz*, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991).

Subsection (4) of this section makes the operative event for an enhanced charge of DUI the fact that the defendant has pled or been found guilty of a prior violation of § 18-8004 within five years, and because defendant's plea of guilty was within five years, and it was not specifically set aside when the district court dismissed the charges against him, the dismissal of the prior charges did not reverse or vacate the determination of defendant's guilt for the purposes of subsection (4). *State v. Deitz*, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991).

The provisions of this section, which require sentencing courts to advise defendants in writing of enhanced penalties for subsequent violations, do not make the written

advice a condition precedent to prosecution under the enhanced penalty provisions. *State v. Nickerson*, 121 Idaho 925, 828 P.2d 1330 (Ct. App. 1992).

The state met its burden of establishing that plaintiff's prior DUI conviction was a valid conviction which, together with his current conviction, was sufficient to enhance the current conviction to a felony. *State v. Beloit*, 123 Idaho 36, 844 P.2d 18 (1992).

The computation period set forth in subsection (5) of this section is tolled between the commission of an offense and the time a plea or finding of guilt is entered, pursuant to subsection (6) of this section, and defendant's objections to his conviction, based on the premise that his 1990 DUI was improperly used to enhance his 1995 DUI to a felony, were without merit. *State v. Pusey*, 128 Idaho 647, 917 P.2d 804 (Ct. App. 1996).

As subsection (6) of this section provides, as regarded defendant's enhancement of DUI offense, the period between DUI incident leading to instant charge, and the date defendant entered his conditional plea of guilty, was not to be considered in the computation of the five-year period for felony DUI. *State v. Pusey*, 128 Idaho 647, 917 P.2d 804 (Ct. App. 1996).

Nothing in subsection (7) of this section gives offenders with prior DUI felony convictions the opportunity to commit repeat violation without incurring statutorily enhanced penalties. *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000).

Prior Convictions.

Where defendant's guilty pleas to two prior misdemeanor DUI charges were made knowingly, intelligently, and voluntarily and where the trial court complied with the requirements of I.C.R. 11(c) in both instances, prior convictions could serve as the basis for a felony DUI charge. *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

Revocation of Probation.

Where the defendant's criminal history of defendant charged with violating probation granted in conjunction with a felony conviction for driving under the influence was replete with driving violations involving alcohol, and given the fact that although on more than one occasion the defendant had attempted to treat his alcohol problem, he had failed to complete the treatment programs ordered by the court, and since it is entirely within the discretion of the trial court to determine that if rehabilitation measures undertaken during probation fail, and if such measures should be shifted to the more structured setting of a custodial facility, the district court did not abuse its sentencing discretion by revoking probation and imposing one of incarceration. *State v. Johnson*, 119 Idaho 107, 803 P.2d 1013 (Ct. App. 1991).

Sentence.

—Improper.

Where the magistrate noted that a fatality occurred as a result of a collision involving defendant's car and another vehicle but did not find that defendant's conduct caused the collision, without such a finding, statements made by the magistrate before sentencing suggest that he may have thought aggravating circumstances were shown by the death alone once a defendant's punishment should not be made more severe on account of circumstances that were not caused by his wrongful conduct. *State v. Detweiler*, 115 Idaho 443, 767 P.2d 286 (Ct. App. 1989).

Where defendant entered his guilty plea to an unenhanced misdemeanor DUI, but received a sentence consistent with the penalty for an enhanced offense DUI under this section, to uphold the sentence would have been contrary to law. *State v. Halford*, 124 Idaho 411, 860 P.2d 27 (Ct. App. 1993).

—Proper.

Concurrent indeterminate sentences of two years for the driving under the influence, two years for the insufficient funds check and five years for the malicious injury to property was not an abuse of discretion where the defendant had an extensive criminal record when he committed the offenses, he suffered from severe alcoholism superimposed over a diagnosed aggressive personality disorder, creating a distinct potential for future violent behavior, and the presentence investigator concluded that he was a poor candidate for probation. *State v. Bolton*, 114 Idaho 269, 755 P.2d 1307 (Ct. App. 1988).

Sentences of five years' imprisonment without eligibility for parole for three years for driving while under the influence, and three years' concurrent imprisonment without parole for two years, for driving without privileges were not unduly severe, and the district court did not abuse its discretion in not exercising leniency by reducing the sentences, where numerous attempts had been unsuccessful in deterring defendant from driving while intoxicated. *State v. Garza*, 115 Idaho 32, 764 P.2d 109 (Ct. App. 1988).

The 15-year indeterminate part of defendant's sentences was reasonable in light of his numerous prior alcohol-related driving offenses and his extensive history of repetitive unlawful behavior. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

The judge fairly considered each of the sentencing factors in that he noted the defendant undoubtedly had been an outstanding worker who could be a productive member of society but for his alcohol and glue addictions; the protection of society was properly consid-

ered to be of primary importance in arriving at an appropriate sentence; defendant was a longtime alcoholic; he had undergone counseling and treatment; he had been given probation, paid fines and been incarcerated several times, and nothing had worked to stop his driving while intoxicated; and no short-term rehabilitative program had been shown to be effective; therefore the five-year minimum period of incarceration was reasonable for the crime of DUI and aggravated assault. *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991).

Defendant had been convicted of driving under the influence on seven occasions, three of them charged as felonies; defendant's current DUI was committed while he was still on probation for a previous DUI conviction for which the district court ordered a four-year unified sentence with one year fixed where the sentence was suspended and defendant was placed on probation and ordered to serve one year in jail, and defendant's criminal record also included a conviction for delivery of a controlled substance; therefore defendant's sentence of one year's fixed confinement and four years indeterminate is reasonable in light of the nature of the crimes he committed and his character as revealed by his extensive criminal history of alcohol-and-drug-related offenses and defendant failed to establish that the district court abused its discretion in denying his motion for reduction of his sentence. *State v. Jimenez*, 120 Idaho 753, 819 P.2d 1153 (Ct. App. 1991).

Where defendant had a prior record of seven DUI offenses, numerous traffic offenses involving alcohol, assault and child endangerment, and a perjury conviction in federal court, the District Court did not abuse its discretion in imposing a five-year term, with two years fixed. *State v. Smith*, 120 Idaho 961, 821 P.2d 1016 (Ct. App. 1991).

At the time defendant was charged with DUI, he was on probation under a suspended sentence for a previous felony DUI and he disclosed that he had been cited a total of 23 times for DUI in the past 22 years; therefore, the court did not abuse its discretion in imposing a sentence of four years, with a two year period of minimum confinement. *State v. Elliot*, 121 Idaho 786, 828 P.2d 349 (Ct. App. 1992).

The district court did not err in imposing a unified sentence of five years, including a two year minimum term of confinement on defendant's felony DUI conviction where the district court was persuaded that defendant's lengthy DUI record, the fact that he had reoffended while released on his own recognition pending sentencing, and the recommendation of the Jurisdictional Review Committee, all indicated that society would be best protected by denying probation. *State v.*

Cardona, 123 Idaho 16, 843 P.2d 166 (Ct. App. 1992).

Where defendant had previously been convicted 24 times of driving while under the influence, the court reasonably concluded that the unified sentence of five years, with four years' minimum period of confinement was necessary in order to minimize the risk of recurrence of the defendant's criminal conduct. *State v. Wildcat*, 123 Idaho 514, 849 P.2d 975 (Ct. App. 1993).

Sentence of two to five years' incarceration imposed for felony DUI conviction was not shown to be excessive or an abuse of the sentencing court's discretion where the sentence was imposed after the district court had duly contemplated each of the sentencing objectives and reasoned that the protection of society was its paramount concern. *State v. Thomas*, 123 Idaho 183, 845 P.2d 1216 (Ct. App. 1993).

Sentence of five years, with a one-year period of minimum confinement for driving under the influence was reasonable, where at time defendant was charged, he was on probation under a suspended sentence for a previous felony DUI, and had six previous felony convictions over the preceding eleven years. *State v. Smith*, 124 Idaho 567, 861 P.2d 1232 (Ct. App. 1993).

Where defendant had two prior DUI convictions and was driving with his license suspended at the time of arrest, a sentence of six months confinement was not an abuse of discretion. *State v. Croston*, 124 Idaho 471, 860 P.2d 674 (Ct. App. 1993).

The trial court did not abuse its discretion in imposing a six month sentence of incarceration, ninety days suspended for defendant's DUI conviction where, defendant had a .14 blood alcohol concentration following his arrest and he also had one prior DUI conviction. A sentence of ninety days in jail for a second DUI offense furthers the sentencing goals of protection of society, deterrence, and retribution; further, the sentence advanced the goal of rehabilitation because it conditioned the suspension of ninety days' jail time upon defendant's completion of outpatient treatment for alcoholism. *State v. Hunnel*, 125 Idaho 623, 873 P.2d 877 (1994).

Sufficiency of Complaint.

Where the pleading gave at least general, though imprecise notice of charge of second offense DUI without alleging the time, place and validity of prior conviction, and the defendant did nothing to seek clarification of the charge in the trial court, and the defendant did not contend that he was actually misled or prejudiced by the generality of the pleading, a claim of a technical insufficiency of the complaint was not a claim of fundamental error which could be first introduced on appeal

following a guilty plea. *State v. Tucker*, 124 Idaho 621, 862 P.2d 313 (Ct. App. 1993).

Suspension.

An order of suspension for failure to take a blood-alcohol test under § 18-8002 remains in effect despite a subsequent judgment containing no period of suspension under this section. *State v. Breed*, 111 Idaho 497, 725 P.2d 202 (Ct. App. 1986).

—Effect of § 18-8002A.

Section 18-8002A expressly provides that an administrative suspension pursuant to

§ 18-8002A is in addition to any suspension imposed pursuant to this section. *State v. Talavera*, 127 Idaho 700, 905 P.2d 633 (1995).

Collateral References. Validity, construction, and application of statute permitting forfeiture of motor vehicle for operating while intoxicated. 89 A.L.R.5th 539.

Pardoned or expunged conviction as “prior offense” under state statute or regulation enhancing punishment for subsequent conviction. 97 A.L.R.5th 293.

18-8006. Aggravated driving while under the influence of alcohol, drugs or any other intoxicating substances. — (1) Any person causing great bodily harm, permanent disability or permanent disfigurement to any person other than himself in committing a violation of the provisions of section 18-8004(1)(a) or (1)(c), Idaho Code, is guilty of a felony, and upon conviction:

(a) Shall be sentenced to the state board of correction for not to exceed ten (10) years, provided that notwithstanding the provisions of section 19-2601, Idaho Code, should the court impose any sentence other than incarceration in the state penitentiary, the defendant shall be sentenced to the county jail for a mandatory minimum period of not less than thirty (30) days, the first forty-eight (48) hours of which must be consecutive; and further provided that notwithstanding the provisions of section 18-111, Idaho Code, a conviction under this section shall be deemed a felony;

(b) May be fined an amount not to exceed five thousand dollars (\$5,000);

(c) Shall surrender his driver's license or permit to the court; and

(d) Shall have his driving privileges suspended by the court for a mandatory minimum period of one (1) year after release from imprisonment, and may have his driving privileges suspended by the court for not to exceed five (5) years after release from imprisonment, during which time he shall have absolutely no driving privileges of any kind; and

(e) Shall be ordered by the court to pay restitution in accordance with chapter 53, title 19, Idaho Code.

(2) Notwithstanding any other provision of law, any evidence of conviction under this section shall be admissible in any civil action for damages resulting from the occurrence. A conviction for the purposes of this section means that the person has pled guilty or has been found guilty, notwithstanding the form of the judgment(s) or withheld judgment(s). [I.C., § 18-8006, as added by 1984, ch. 22, § 2, p. 25; am. 1986, ch. 201, § 2, p. 501; am. 1989, ch. 88, § 63, p. 151; am. 1990, ch. 45, § 46, p. 71; am. 1997, ch. 114, § 2, p. 284; am. 2000, ch. 356, § 1, p. 1191.]

Compiler's notes. Section 8 of S.L. 1984, ch. 22 declared an emergency and provided that the act should take effect on March 1, 1984. Approved February 29, 1984.

Section 47 of S.L. 1990, ch. 45, read: “This act shall be in full force and effect on and after

July 1, 1990, with the exception that the provisions within each applicable section of Idaho Code relating to classes of driver's licenses shall take effect no later than September 1, 1990, as determined by the director of the Idaho transportation department, and

until that time, existing laws shall remain in effect." Approved March 12, 1990.

Sec. to sec. ref. This section is referred to in §§ 18-4006, 18-8001, 18-8002, 18-8002A, 49-240, 49-325 and 72-1003.

Cited in: State v. Woolery, 116 Idaho 368, 775 P.2d 1210 (1989).

ANALYSIS

Basis of violation.

Blood alcohol concentration.

Causation.

Constitutionality.

Evidence.

Implied consent.

Legislative intent.

Lesser included offenses.

Multiple charges.

Sentence upheld.

Basis of Violation.

A violation of § 18-8004 is committed by a person when he or she is driving or is in actual physical control of a motor vehicle and is either (a) under the influence of alcohol, drugs or any other intoxicating substances, or (b) has an alcohol concentration of 0.10 or more. The state need not prove that the person was actually impaired by alcohol, but merely that the analysis of blood, urine, or breath had established an alcohol concentration of 0.10 or more. By so structuring the drunk driving statute, the legislature was expressing its intent that prosecutions for drunk driving may be grounded in a per se 0.10 alcohol concentration test, rather than in complicated proof over the level of impairment of any particular individual. State v. Nelson, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

Blood Alcohol Concentration.

By cross-referencing to the provisions of § 18-8004, this section allows for prosecutions for aggravated driving without the necessity for the state to prove that the alcohol or other substance-related impairment was actually sufficient to have caused certain driving behavior, which in turn caused great bodily injury to another. To interpret that statute otherwise would be to disregard the per se nature of the alcohol concentration aspect of the definition of drunk driving. State v. Nelson, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

In a criminal prosecution for vehicular manslaughter and aggravated driving under the influence (DUI), the trial court reversibly erred in admitting evidence of defendant's blood alcohol level two hours after the accident; the blood tests were not accompanied by any evidence that would reveal defendant's alcohol concentration at the time of the accident; therefore, defendant's convictions were

vacated. State v. Robinett, — Idaho —, — P.3d —, 2004 Ida. App. LEXIS 2 (Ct. App. Jan. 7, 2004).

Causation.

This section provides as an element of the offense that the defendant must have "caused" great bodily harm to the victim. The requirement of causation in the aggravated driving statute is in accord with the concept that strict liability crimes are disfavored in Idaho. State v. Nelson, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

This section merely requires a causal connection between defendant's driving under the influence and victim's injuries rather than requiring gross negligence of defendant pursuant to § 18-114. State v. Johnson, 126 Idaho 892, 894 P.2d 125 (1995).

Constitutionality.

Since this section makes it a crime for an intoxicated driver to cause severe injury to another person, gives notice to those who are subject to it, is not ambiguous, provides sufficient guidelines to those who must enforce it, gives adequate guidelines regarding whether the intoxicated driver caused injury to another person, and since the question of whether an intoxicated driver's negligence caused another person's injury will always be a factual inquiry, such section is not unconstitutionally vague. State v. Nelson, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

Evidence.

Where, in a prosecution for aggravated driving under the influence, involving a single-vehicle collision, the jury's finding of the defendant as the driver at the time of the accident was supported by substantial evidence that he was pinned in the driver's area when the rescue personnel arrived, the extrication team could not make passage from the driver's side to the passenger's side, he made statements that he was driving, the evidence further demonstrated the degree of intoxication experienced by the defendant, and the evidence showed that the defendant caused the co-occupant to suffer serious and debilitating injuries, making the offense "aggravated" within the meaning of this section, the evidence was sufficient to show beyond a reasonable doubt that the defendant committed aggravated driving while under the influence. State v. Koch, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

In a prosecution for aggravated driving under the influence, allegations, not specified as grounds for objection at trial, that the state failed to prove the blood sample was withdrawn in the proper manner and properly processed for testing, or that the hospital's automatic chemical analyzer operated on the basis of accepted scientific principles, did not

establish failure of authentication and identification, under I.R.E. 901, constituting plain error in admitting evidence of the test result. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

Implied Consent.

Since defendant, convicted of aggravated driving under the influence, had impliedly consented to the blood alcohol test pursuant to § 18-8002(1), the state was not required to demonstrate that the search was justified by exigent circumstances; lower court's order denying defendant's motion to suppress results of blood alcohol test was affirmed. *State v. Rodriguez*, 128 Idaho 521, 915 P.2d 1379 (Ct. App. 1996).

Legislative Intent.

To be convicted of aggravated driving while under the influence of intoxicating substances the state need not prove that the great bodily injury was proximately caused by the driver's intoxicated state which in turn caused certain driving conduct. The statute requires that some causation, however, be proved, but the phrase "in committing" should be interpreted to mean that a defendant may be found guilty of aggravated driving under the influence if he or she causes that statutorily-specified harm while in the course of violating § 18-8004. This interpretation is in keeping with a legislative intent to criminalize driving conduct which would normally fall within the realm of negligence when it is done while the person is in violation of the provisions of § 18-8004. *State v. Nelson*, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).

Lesser Included Offenses.

Where the charges against defendant, set forth in the information, did not contain any language indicating that defendant's efforts to elude an officer and recklessly drive his vehicle were the manner by which defendant violated this section, the offenses of fleeing or attempting to elude a peace officer and reck-

less driving were not lesser included offenses of aggravated driving while under the influence of alcohol. *State v. Rosencrantz*, 130 Idaho 666, 946 P.2d 628 (1997).

Multiple Charges.

Defendant was convicted of vehicular homicide and aggravated driving under the influence of alcohol because the death of the first victim and the bodily injury inflicted upon the second victim resulted from his single act of driving under the influence. *State v. Lowe*, 120 Idaho 391, 816 P.2d 347 (Ct. App. 1990).

Sentence Upheld.

Sentence of 60 days was within the statutory maximum and was not unreasonable, even though defendant had no previous criminal record, was an exemplary citizen, was employed, and had committed to a program of alcohol abstinence. *State v. Christensen*, 109 Idaho 725, 710 P.2d 635 (Ct. App. 1985).

The district court acted within the bounds of its discretion in imposing the maximum sentences on defendant who pled guilty to two counts of vehicular manslaughter and three counts of aggravated driving while under the influence of alcohol. *State v. Tousingnant*, 123 Idaho 22, 843 P.2d 172 (Ct. App. 1992).

Trial court did not abuse its discretion by modifying defendant's sentence for aggravated DUI from a unified term for four years, with a minimum period of confinement of two years, to an indeterminate term of four years with no minimum period of confinement where defendant had prior criminal record, he refused to take responsibility for his actions, and he failed to complete an alcohol treatment program while an inpatient at a state facility. *State v. Langford*, 136 Idaho 334, 33 P.3d 567 (Ct. App. 2001).

Collateral References. Assimilation, under Assimilative Crimes Act (18 U.S.C.A. § 13), of state statutes relating to driving while intoxicated or under influence of alcohol. 175 A.L.R. Fed. 293.

18-8007. Leaving scene of accident resulting in injury or death.

— (1) The driver of any vehicle that has been involved in an accident, either upon public or private property open to the public, who knows or has reason to know that said accident has resulted in injury to or death of any person shall:

(a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible. Every stop required under this section shall be made without obstructing traffic more than is necessary.

(b) Remain at the scene of the accident until the driver has fulfilled all the requirements under this section.

(c) Give his name, address, the name of his insurance agent or company if he has automobile liability insurance, and the motor vehicle registra-

tion number of the vehicle he is driving to the person struck, or to the driver or occupant of or person attending any vehicle collided with.

(d) If available, exhibit his driver's license to the person struck, or to the driver or occupant of or person attending any vehicle collided with.

(e) Render to any person injured in the accident reasonable assistance, including the conveying or the making of arrangements for the conveying of such person to a physician, surgeon, hospital or other medical facility, for medical or surgical treatment, if it is apparent that such treatment is necessary or if such conveying is requested by the injured person.

(2) A violation of any provision of this section shall constitute a felony and be punished by a fine of not more than five thousand dollars (\$5,000) or by imprisonment in the state penitentiary for a period of not more than five (5) years, or by both such fine and imprisonment.

(3) The director of the transportation department shall revoke for a period of one (1) year the driver's license or permit to drive, or the nonresident operating privilege, of any person convicted or found guilty of violating any provision of this section. Such revocation shall preclude any type of work permit or other form of limited driving privileges as provided in section 49-326, Idaho Code. [I.C., § 18-8007, as added by 1987, ch. 208, § 1, p. 440; am. 1988, ch. 265, § 565, p. 549; am. 1989, ch. 88, § 64, p. 151; am. 1992, ch. 115, § 41, p. 345.]

Compiler's notes. Sections 564 and 566 of S.L. 1988, ch. 265 are compiled as §§ 18-8005 and 28-9-302, respectively.

Section 65 of S.L. 1989, ch. 88 is compiled as § 18-1502.

Sections 40 and 42 of S.L. 1992, ch. 115 are compiled as §§ 18-8005 and 33-1701, respectively.

Section 586 of S.L. 1988, ch. 265 provided that the act should take effect on and after January 1, 1989.

Section 70 of S.L. 1989, ch. 88 as amended by § 1 of S.L. 1990, ch. 45 provided that the act would become effective July 1, 1990.

Sec. to sec. ref. This section is referred to in §§ 18-8001 and 72-1003.

ANALYSIS

Construction.

Evidence.

Plea upheld.

Search and seizure.

Sentence.

Construction.

Defendant's contention that the offense of leaving the scene of an injury accident occurred after all operation of his motor vehicle had ceased, and therefore, the offense did not fall within the ambit of the state's jurisdiction under I.C. § 67-5101(G) to enforce laws concerning "operation and management of motor vehicles," was unpersuasive, as wording of this section makes it clear that it may be invoked only against a motor vehicle operator

and only if the vehicle has been involved in an accident. *State v. Smith*, 127 Idaho 771, 906 P.2d 141 (Ct. App. 1995).

Evidence.

Evidence supported the jury's finding that defendant was the driver of the vehicle which struck victim. Trapped in the broken windshield of the car located by police the day after the accident was hair resembling the victim's and human blood. Both the VIN and the receipt found in the back seat of the car connected it to defendant. At trial, defendant's employer identified defendant's car from a photo and testified that he had seen defendant driving the car, and nobody ever reported that the car had been stolen. Boot prints found around the vehicle exhibited the same tread design as prints found at the location where defendant was living. Moreover, defendant's boots were retrieved from his home, and lab tests conducted on these boots were inconclusive but showed that defendant's boots could have made the impressions at the accident scene. *State v. Mendiola*, 126 Idaho 575, 887 P.2d 1082 (Ct. App. 1994).

Plea Upheld.

The record showed that at the change of plea hearing, defendant conceded that he did hit the victims with his truck and that he subsequently fled the scene. The judge did ascertain that there was a strong factual basis for the plea, and that defendant did enter his plea knowingly and voluntarily.

State v. Ramirez, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).

Fourth Amendment. State v. Rader, 135 Idaho 273, 16 P.3d 949 (Ct. App. 2000).

Search and Seizure.

Given the nature of the sounds, and their close temporal proximity, the officer's conclusion that a hit-and-run accident may have occurred in the adjacent parking lot was reasonable, and where he observed that there were no vehicles driving down the adjacent road or pulling out of the parking lot other than defendant's vehicle, the officer's stop of defendant's vehicle to investigate possible criminal activity was justified under the

Sentence.

Where defendant drove his truck into a group of people causing serious injuries including the loss of one victim's arm, and defendant later led police on a high speed chase, a unified sentence of five years with four years fixed was reasonable for a plea to the charge of leaving the scene of an accident resulting in injury. State v. Ramirez, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).

18-8008. Ignition interlocks — Electronic monitoring devices. —

(1) If a person is convicted, is found guilty, pleads guilty or receives a withheld judgment for violating any of the provisions of this chapter and has had any or all of a sentence or fine suspended for the violation, the court, in its discretion, may impose any, some, or all of the sanctions provided for in this section in addition to any other penalty or fine imposed pursuant to this chapter.

(2) The court shall order the person while operating a motor vehicle to drive only a motor vehicle equipped with a functioning ignition interlock device, and the restriction shall be for a period not in excess of the time the person is on probation for the offense. The court shall establish a specific calibration setting at which the ignition interlock device will prevent the motor vehicle from being started and the period of time that the person shall be subject to the restriction. As used in this section, the term "ignition interlock device" means breath alcohol analyzed ignition equipment, certified by the transportation department, designed to prevent a motor vehicle from being operated by a person who has consumed an alcoholic beverage. The transportation department shall by rule provide standards for the certification, installation, repair and removal of the devices. The court shall notify the transportation department of its order imposing a sanction pursuant to this subsection. The department shall attach or imprint a notation on the driver's license or other document granting the person restricted driving privileges of any person restricted under this subsection that the person may operate only a motor vehicle equipped with an ignition interlock device.

(3) The court may order the person to use electronic monitoring devices to record the person's movements if as a condition of probation the person has been given restricted driving privileges between certain times, has been placed under a curfew or has been ordered confined to his residence during times certain. Nothing in this subsection shall restrict the court's usage of electronic monitoring devices to supervise a defendant on probation for other offenses.

(4) If a court orders a defendant to use an ignition interlock device or electronic monitoring device pursuant to this section, and the court, or its probation department, furnishes the defendant with the device, the court may order the defendant to pay a reasonable fee for utilizing the equipment. All fees collected pursuant to this section shall be in addition to any other

finer or penalty provided by law and shall be deposited in the court interlock device and electronic monitoring device fund created in section 18-8010, Idaho Code. [I.C., § 18-8008, as added by 1988, ch. 339, § 2, p. 1007; am. 2000, ch. 247, § 4, p. 692.]

Legislative Intent. Section 1 of S.L. 1988, ch. 339 read: "SECTION 1. LEGISLATIVE INTENT. The legislature finds and declares:

"(1) There is a need to reduce the incidence of drivers on the highways and roads of this state who, because of their use or consumption of alcohol, pose a danger to the health and safety of other drivers;

"(2) There are some innovative alternatives adopted by other states in an attempt to discourage the drinking driver from operating a motor vehicle which include the use of interlock devices when the driver has been convicted, found guilty or received a withheld judgment for driving under the influence of alcohol or drugs;

"(3) The installation of an ignition interlock breath alcohol device will provide a

means of deterring the use of motor vehicles by persons who have consumed alcoholic beverages;

"(4) Ignition interlock devices are designed to supplement other methods of punishment that prevent drivers from using a motor vehicle after using, possessing or consuming alcohol;

"(5) It is economically and technically feasible to have an ignition interlock device installed in a motor vehicle in such a manner that the vehicle will not start if the operator has recently consumed alcohol."

Compiler's notes. Section 3 of S.L. 2000, ch. 247 is compiled as § 18-8005.

Sec. to sec. ref. This section is referred to in §§ 18-8004A, 18-8004C, 18-8005 and 18-8010.

18-8009. Ignition interlocks — Assisting another in starting or operating — Penalty. — A person who knowingly assists another person who is restricted to the use of an ignition interlock device to start and operate that vehicle in violation of a court order shall be guilty of a misdemeanor. The provisions of this section do not apply if the starting of a motor vehicle, or the request to start a motor vehicle, equipped with an ignition interlock device is done for the purpose of safety or mechanical repair of the device or the vehicle and person subject to the court order does not operate the vehicle. [I.C., § 18-8009, as added by 1988, ch. 339, § 3, p. 1007.]

18-8010. Surcharge added to all fines. — Every person who is convicted, found guilty, pleads guilty or receives a withheld judgment for violating the provisions of this chapter shall be required to pay an additional fifteen dollars (\$15.00) in addition to any other fine, penalty or costs the court may assess. Moneys received pursuant to this section shall be remitted to the county treasurer in the county where the person was adjudicated for deposit in the "court interlock device and electronic monitoring device fund" which is hereby created in each county. Moneys in this fund may be utilized for the purchase of ignition interlock devices and electronic monitoring devices required pursuant to section 18-8008, Idaho Code. Additionally, any moneys a court charges a defendant for using an ignition interlock device or electronic monitoring devices shall be placed in this fund. The court may also utilize moneys in this fund to assist an indigent defendant to procure an ignition interlock device or electronic monitoring devices. The court may also utilize moneys in this fund for alcohol or drug abuse related probation, treatment or prevention programs for adults or juveniles. [I.C., § 18-8010, as added by 1988, ch. 339, § 4, p. 1007; am. 1996, ch. 417, § 1, p. 1387; am. 1998, ch. 416, § 1, p. 1314.]

Sec. to sec. ref. This section is referred to in § 18-8008.

18-8011. Stay of suspension of drivers' licenses or driving privileges upon reincarceration. — A court-ordered suspension of an individual's driver's license or driving privileges issued pursuant to this chapter that is to commence after that individual's release from confinement or imprisonment, shall cease to run if the individual is reincarcerated. The court-ordered suspension will be stayed for the entire period the individual is reincarcerated and will recommence as of the date the individual is rereleased from confinement or imprisonment. Upon the individual's release from confinement or imprisonment, the suspension period will run for the number of days remaining on the suspension as of the date of the individual's reincarceration. [I.C., § 18-8011, as added by 1998, ch. 152, § 4, p. 523.]

Compiler's notes. Section 3 of S.L. 1998, ch. 152 is compiled as § 49-326A.

CHAPTER 81

TERRORIST CONTROL ACT

SECTION.

18-8101. Purpose.
18-8102. Definitions.
18-8103. Prohibited activities — Penalties.
18-8104. Exclusions.

SECTION.

18-8105. [Severability.]
18-8106. Providing material support to terrorists.

18-8101. Purpose. — The legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any subject, to associate with others who share similar beliefs, and to keep and bear arms. It is not the intent, by the provisions of this chapter, to interfere with the exercise of rights protected by the constitutions of the state of Idaho or the United States. The legislature further recognizes and finds that conspiracies and training activities in furtherance of unlawful acts of violence against persons and property is not constitutionally protected, poses a threat to public order and safety, and should be subject to criminal sanctions. [I.C., § 18-8101, as added by 1987, ch. 318, § 1, p. 669.]

18-8102. Definitions. — As used in this chapter:

(1) "Civil disorder" means any public disturbance involving acts of violence by an assemblage of two (2) or more persons which acts cause an immediate danger of or result in damage or injury to the property or person of any other individual.

(2) "Governmental military force" means the national guard, as defined in section 101(9) of title 10 [10 U.S.C. § 101(c)(1)], United States Code; the organized militia of any state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, not included with the definition of national guard as defined by such section 101(9); and the armed forces of the United States.

(3) “Law enforcement agency” means a governmental unit of one (1) or more persons employed full time or part time by the state or federal government, or a political subdivision thereof, for the purpose of preventing and detecting crime and enforcing laws or local ordinances and the employees of which are authorized to make arrests for crimes while acting within the scope of their authority.

(4) “Peace officer” means any duly appointed officer of a law enforcement agency as defined herein including, but not limited to, an officer of the Idaho state police, department of fish and game, a sheriff or deputy sheriff of a county, or a marshal or police officer of a city.

(5) “Terrorism” means activities that:

(a) Are a violation of Idaho criminal law; and

(b) Involve acts dangerous to human life that are intended to:

(i) Intimidate or coerce a civilian population;

(ii) Influence the policy of a government by intimidation or coercion; or

(iii) Affect the conduct of a government by the use of weapons of mass destruction, as defined in section 18-3322, Idaho Code. [I.C., § 18-8102, as added by 1987, ch. 318, § 1, p. 669; am. 1995, ch. 116, § 22, p. 386; am. 2000, ch. 469, § 29, p. 1450; am. 2002, ch. 222, § 6, p. 623.]

Compiler’s notes. Subsection (2) refers to “national guard as defined in section 101(9) of title 10, United States Code.” Section 101, Title 10 of the United States Code was amended in 1992. The national guard is now defined in 10 USC § 101(c)(1). The bracketed material in subsection (2) was added by the compiler.

Sections 21 and 23 of S.L. 1995, ch. 116 are

compiled as §§ 6-610A and 37-2701, respectively.

Sections 28 and 30 of S.L. 2000, ch. 469 are compiled as §§ 18-8004 and 18-8303, respectively.

Section 5 of S.L. 2002, ch. 222 is compiled as § 18-7803.

Section 30 of S.L. 1995, ch. 116 declared an emergency. Approved March 14, 1995.

18-8103. Prohibited activities — Penalties. — Any person who:

(1) Conspires with one (1) or more persons to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitutions or laws of the United States or the state of Idaho, by the use of violence against the person or property of such citizen; or

(2) Goes on the highway, or on the premises of any citizen, with one (1) or more other persons, with the intent by use of violence against such citizen or his property, to prevent or hinder his free exercise or enjoyment of any right or privilege so secured; or

(3) Assembles with one (1) or more persons for the purpose of training or instructing in the use of, or practicing with, any technique or means capable of causing property damage, bodily injury or death with the intent to employ such training, instruction or practice in the commission of a civil disorder, as defined herein; or

(4) Commits an act of terrorism, as defined in this chapter; or

(5) Conspires with one (1) or more persons to commit an act of terrorism, as defined in this chapter;

shall be guilty of a felony. A violation of subsection (1), (2) or (3) of this section shall be punished by imprisonment in the state prison for a period not to exceed ten (10) years, by a fine not in excess of fifty thousand dollars

(\$50,000), or by both such fine and imprisonment. A violation of subsection (4) or (5) shall be punished by imprisonment in the state prison for a period of up to and including life imprisonment or by a fine not exceeding fifty thousand dollars (\$50,000), or by both. [I.C., § 18-8103, as added by 1987, ch. 318, § 1, p. 669; am. 2002, ch. 222, § 7, p. 623.]

Sec. to sec. ref. This section is referred to in § 18-7905.

Compiler's notes. Section 8 of S.L. 2002, ch. 222 is compiled as § 18-8106.

18-8104. Exclusions. — Nothing contained in this chapter makes unlawful any act protected pursuant to article I, section 11, of the Idaho constitution, or any act of any peace officer which is performed in the lawful performance of the law enforcement officer's official duties. Nothing contained in this chapter makes unlawful any activity of the department of fish and game, any governmental military force, the department of correction, any law enforcement agency, or any activity intended to teach or practice self-defense or self-defense techniques, such as karate clubs or self-defense clinics, and similar lawful activity, or any facility, program or lawful activity related to firearms instruction and training intended to teach the safe handling and use of firearms, or any other lawful sports or activities related to the individual recreational use or possession of firearms, including but not limited to, hunting activities, target shooting, self-defense, firearms collection or any organized activity including, but not limited to, any hunting club, rifle club, rifle range or shooting range which does not include a conspiracy as defined under the laws of this state or the knowledge of or the intent to cause or further a civil disorder. [I.C., § 18-8104, as added by 1987, ch. 318, § 1, p. 669.]

18-8105. [Severability.] — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act. [I.C., § 18-8105, as added by 1987, ch. 318, § 1, p. 669.]

Compiler's notes. The bracketed catchline "Severability" was inserted by the compiler.

The words "this act" refer to S.L. 1987, ch. 318, which is compiled as §§ 18-8101 to 18-8105.

18-8106. Providing material support to terrorists. — (1) A person who provides material support or resources, or who conceals or disguises the nature, location, source or ownership of material support or resources, with the knowledge and intention that such support or resources are to be used in the preparation or carrying out of a violation of this chapter, or in the preparation or carrying out of the concealment of such support or resources, or in the escape from the commission of any such violation, shall be guilty of a felony and shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years or by a fine not exceeding fifty thousand dollars (\$50,000), or by both.

(2) As used in this section, the term “material support or resources” means currency or other financial securities, financial services, lodging, safe houses, training, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets. “Material support or resources” does not include medical or religious material. [I.C., § 18-8106, as added by 2002, ch. 222, § 8, p. 623.]

Compiler’s notes. Sections 7 and 9 of S.L. 2002, ch. 222 are compiled as §§ 18-8103 and 19-402, respectively.

CHAPTER 82

MONEY LAUNDERING

SECTION.

18-8201. Money laundering and illegal investment — Penalty — Restitution.

18-8201. Money laundering and illegal investment — Penalty — Restitution. — (1) It is unlawful for any person to knowingly or intentionally give, sell, transfer, trade, invest, conceal, transport, or make available anything of value that the person knows is intended to be used to commit or further a pattern of racketeering activity as defined in section 18-7803(d), Idaho Code, or a violation of the provisions of chapter 27, title 37, Idaho Code.

(2) It is unlawful for any person to knowingly or intentionally direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of proceeds known by that person to be derived from a pattern of racketeering activity as defined in section 18-7803(d), Idaho Code, or a violation of the provisions of chapter 27, title 37, Idaho Code.

(3) It is unlawful for any person to knowingly or intentionally conduct a financial transaction involving proceeds known by that person to be derived from a pattern of racketeering activity as defined in section 18-7803(d), Idaho Code, or a violation of the provisions of chapter 27, title 37, Idaho Code, if the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds, or to avoid a transaction reporting requirement under state or federal law.

(4) A person who violates the provisions of this section is guilty of a felony and upon conviction may be fined not more than two hundred fifty thousand dollars (\$250,000) or twice the value of the property involved in the transaction, whichever is greater, or be imprisoned for not more than ten (10) years, or be both so fined and imprisoned.

(5) Upon a conviction of a violation under the provisions of this chapter, the court may order restitution for all costs and expenses of prosecution and investigation, pursuant to the terms and conditions set forth in section 37-2732(k), Idaho Code. [I.C., § 18-8201, as added by 1992, ch. 335, § 1, p. 1004; am. 1993, ch. 105, § 3, p. 266.]

Compiler's notes. Section 2 of S.L. 1993, ch. 105 is compiled as § 18-7804.

Sec. to sec. ref. This section is referred to in § 37-2732.

ANALYSIS

Forfeiture.

Pattern of racketeering activity.

Forfeiture.

Because the U.S. Supreme Court recently determined that civil forfeitures in general, and specifically in cases involving money laundering and drug statutes, do not constitute "punishment" for purposes of the Double Jeopardy Clause, there was no double jeopardy attached to defendant's convictions and sentences for delivery of controlled substance,

money laundering, and failure to pay income tax and the prior forfeiture of his property under § 37-2744. *State v. Ross*, 129 Idaho 380, 924 P.2d 1224 (1996).

Pattern of Racketeering Activity.

Because defendant's securities convictions under §§ 30-1403 and 30-1406 were affirmed, defendant engaged in racketeering conduct, and she engaged in the activity at least twice in a five-year period, and the instances were interrelated, a pattern of racketeering activity existed under § 18-7803(d); consequently, defendant's money laundering conviction, under subsection (2) of this section, was affirmed. *State v. Gertsch*, 17 Idaho 387, 49 P.3d 392 (2002).

CHAPTER 83

SEXUAL OFFENDER REGISTRATION NOTIFICATION AND COMMUNITY RIGHT-TO-KNOW ACT

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18-8301. Short title. — This chapter shall be known and may be cited as the "Sexual Offender Registration Notification and Community Right-to-Know Act." [I.C., § 18-8301, as added by 1998, ch. 411, § 2, p. 1275.]

Compiler's notes. Section 1 of S.L. 1998, ch. 411 repealed former chapter 83, title 18, Idaho Code.

The following sections were repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998: 18-8301, which comprised I.C., § 18-8301,

as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8302, which comprised I.C., § 18-8302, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8303, which comprised I.C., § 18-8303, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8304, which comprised I.C., § 18-8304, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8305, which comprised I.C., § 18-8305, as added by 1993, ch. 155, § 1, p. 391, am. 1996, Ch. 249, § 1, p. was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8305A, which comprised I.C., § 18-8305A, as added by 1996, ch. 249, § 2, p. 784, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8306, which comprised I.C., § 18-8306, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8307, which comprised I.C., § 18-8307, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8308, which comprised I.C., § 18-8308, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8309, which comprised I.C., § 18-8309, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8310, which comprised I.C., § 18-8310, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8311, which comprised I.C., § 18-8311, as added by 1993, ch. 155, § 1, p. 391, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

Sec. to sec. ref. This chapter is referred to in § 18-8328.

Habeas Petitioners.

A habeas corpus petitioner is “in custody” for the purposes of challenging an earlier expired rape conviction when he is incarcerated for failing to comply with a state sex offender registration law, because the petitioner is subject to the registration requirement only because of his initial rape conviction. *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001).

18-8302. Findings. — The legislature finds that sexual offenders present a significant risk of reoffense and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children. Such access further provides a means for organizations that work with youth or other vulnerable populations to prevent sexual offenders from threatening those served by the organizations. Finally, public access assists the community in being observant of convicted sexual offenders in order to prevent them from recommitting sexual crimes. Therefore, this state’s policy is to assist efforts of local law enforcement agencies to protect communities by requiring sexual offenders to register with local law enforcement agencies and to make certain information about sexual offenders available to the public as provided in this chapter. [I.C., § 18-8302, as added by 1998, ch. 411, § 2, p. 1275.]

Compiler’s notes. Former § 18-8302 was repealed. See Compiler’s note, § 18-8301.

Purpose.

The purpose of the Sex Offender Registration Act is not punitive, but remedial, and

offenders are still afforded all due process and constitutional protections other citizens enjoy. *Ray v. State*, 133 Idaho 96, 982 P.2d 931 (1999).

18-8303. Definitions. — As used in this chapter:

(1) "Aggravated offense" means any of the following crimes as set forth in section 18-8304, Idaho Code: 18-1508 (lewd conduct, when the victim is less than twelve (12) years of age); 18-4003(d) (murder committed in the perpetration of rape); 18-6101 (rape, but excluding section 18-6101(1) where the victim is at least twelve (12) years of age or the defendant is eighteen (18) years of age or younger); 18-6108 (male rape); and 18-6608 (forcible sexual penetration by use of a foreign object).

(2) "Board" means the sexual offender classification board described in section 18-8312, Idaho Code.

(3) "Central registry" means the registry of convicted sexual offenders maintained by the Idaho state police pursuant to this chapter.

(4) "Certified evaluator" means either a psychiatrist licensed by this state pursuant to chapter 18, title 54, Idaho Code, or a master's or doctoral level mental health professional licensed by this state pursuant to chapter 23, chapter 32, or chapter 34, title 54, Idaho Code. Such person shall have by education, experience and training, expertise in the assessment and treatment of sexual offenders, and such person shall meet the qualifications and shall be approved by the board to perform psychosexual evaluations in this state, as described in section 18-8314, Idaho Code.

(5) "Department" means the Idaho state police.

(6) "Employed" means full-time or part-time employment exceeding ten (10) consecutive working days or for an aggregate period exceeding thirty (30) days in any calendar year, or any employment which involves counseling, coaching, teaching, supervising or working with minors in any way regardless of the period of employment, whether such employment is financially compensated, volunteered or performed for the purpose of any government or education benefit.

(7) "Incarceration" means committed to the custody of the Idaho department of correction, but excluding cases where the court has retained jurisdiction.

(8) "Offender" means an individual convicted of an offense listed and described in section 18-8304, Idaho Code, or a substantially similar offense under the laws of another state or in a federal, tribal or military court or the court of another country.

(9) "Offense" means a sexual offense listed in section 18-8304, Idaho Code.

(10) "Predatory" means actions directed at an individual who was selected by the offender for the primary purpose of engaging in illegal sexual behavior.

(11) "Psychosexual evaluation" means an evaluation which specifically addresses sexual development, sexual deviancy, sexual history and risk of reoffense as part of a comprehensive evaluation of an offender.

(12) "Recidivist" means an individual convicted two (2) or more times of any offense requiring registration under this chapter.

(13) "Residence" means the offender's present place of abode.

(14) "Student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any

secondary school, trade or professional institution or institution of higher education.

(15) “Violent sexual predator” means a person who has been convicted of an offense listed in section 18-8314, Idaho Code, and who has been determined to pose a high risk of committing an offense or engaging in predatory sexual conduct. [I.C., § 18-8303, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 349, § 1, p. 932; am. 2000, ch. 236, § 1, p. 663; am. 2000, ch. 469, § 30, p. 1450; am. 2001, ch. 194, § 1, p. 659; am. 2002, ch. 183, § 1, p. 532; am. 2003, ch. 235, § 1, p. 602; am. 2004, ch. 125, § 1, p. 416.]

Compiler’s notes. Former § 18-8303 was repealed. See Compiler’s note, § 18-8301.

This section was amended by two 2000 acts — ch. 236, § 1 and ch. 469, § 30, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 236, § 1 added present subdivision (10); and redesignated former subdivisions (10) through (12) as present subdivisions (11) through (13).

The 2000 amendment by ch. 469, § 30, in subdivisions (2) and (3), substituted “Idaho state police” for “Idaho department of law enforcement”.

Section 2 of S.L. 2000, ch. 236 is compiled as § 18-8310.

Sections 29 and 31 of S.L. 2000, ch. 469 are compiled as §§ 18-8102 and 18-8315, respectively.

Section 2 of S.L. 2002, ch. 183 is compiled as § 18-8312.

Section 2 of S.L. 2003, ch. 235 is compiled as § 18-8314.

Section 2 of S.L. 2004, ch. 125 is compiled as § 18-8314.

Section 6 of S.L. 2004, ch. 125 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in §§ 18-8316 and 18-8317.

18-8304. Application of chapter. — (1) The provisions of this chapter shall apply to any person who:

(a) On or after July 1, 1993, is convicted of the crime, or an attempt, a solicitation, or a conspiracy to commit a crime provided for in section 18-909 (assault with attempt to commit rape, infamous crime against nature, or lewd and lascivious conduct with a minor, but excluding mayhem, murder or robbery), 18-911 (battery with attempt to commit rape, infamous crime against nature, or lewd and lascivious conduct with a minor, but excluding mayhem, murder or robbery), 18-1506 (sexual abuse of a child under sixteen years of age), 18-1506A (ritualized abuse of a child), 18-1507 (sexual exploitation of a child), 18-1507A (possession of sexually exploitative material for other than a commercial purpose), 18-1508 (lewd conduct with a minor child), 18-1508A (sexual battery of a minor child sixteen or seventeen years of age), 18-1509A (enticing a child over the internet), 18-4003(d) (murder committed in perpetration of rape), 18-4116 (indecent exposure, but excluding a misdemeanor conviction), 18-4502 (first degree kidnapping committed for the purpose of rape, committing the infamous crime against nature or for committing any lewd and lascivious act upon any child under the age of sixteen, or for purposes of sexual gratification or arousal), 18-4503 (second degree kidnapping where the victim is an unrelated minor child), 18-6101 (rape, but excluding 18-6101(1) where the defendant is eighteen years of age or younger), 18-6108 (male rape), 18-6602 (incest), 18-6605 (crime against nature), 18-6608 (forcible sexual penetration by use of a foreign object), or upon a second or subsequent conviction under 18-6609, Idaho Code (video voyeurism);

(b) Enters the state on or after July 1, 1993, and who has been convicted of any crime, an attempt, a solicitation or a conspiracy to commit a crime in another state, territory, commonwealth, or other jurisdiction of the United States, including tribal courts and military courts, that is substantially equivalent to the offenses listed in subsection (1)(a) of this section.

(c) Pleads guilty to or has been found guilty of a crime covered in this chapter prior to July 1, 1993, and the person, as a result of the offense, is incarcerated in a county jail facility or a penal facility or is under probation or parole supervision, on or after July 1, 1993.

(d) Is a nonresident regularly employed or working in Idaho or is a student in the state of Idaho and was convicted, found guilty or pleaded guilty to a crime covered by this chapter and, as a result of such conviction, finding or plea, is required to register in his state of residence.

(2) The provisions of this chapter shall not apply to any such person while the person is incarcerated in a correctional institution of the department of correction, a county jail facility or committed to a mental health institution of the department of health and welfare.

(3) A conviction for purposes of this chapter means that the person has pled guilty or has been found guilty, notwithstanding the form of the judgment or withheld judgment. [I.C., § 18-8304, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 302, § 1, p. 753; am. 1999, ch. 349, § 2, p. 932; am. 2001, ch. 194, § 2, p. 659; am. 2003, ch. 145, § 2, p. 418; am. 2004, ch. 122, § 2, p. 410.]

Compiler's notes. Former § 18-8304 was repealed. See Compiler's note, § 18-8301.

The words enclosed in parentheses so appeared in the law as enacted.

This section was amended by two 1999 acts, ch. 302, § 1 and ch. 349, § 2, which appear to be compatible and have been compiled together.

The 1999 amendment by ch. 302, § 1, inserted "(assault with intent to commit" preceding "rape," and inserted "(battery with intent to commit" preceding "rape," in subdivision (1)(a).

The 1999 amendment by ch. 349, § 2 inserted "(assault with attempt to commit" preceding "rape," inserted "(battery with attempt to commit" preceding "rape," in subdivision (1)(a) and added subdivision (1)(d).

Section 2 of S.L. 1999, ch. 302 is compiled as § 18-8306.

Section 3 of S.L. 1999, ch. 349 is compiled as § 18-8307.

Section 3 of S.L. 2001, ch. 194 is compiled as § 18-8310.

Section 1 of S.L. 2003, ch. 145 is compiled as § 18-1509A.

Section 1 of S.L. 2004, ch. 122 is compiled as § 18-6609.

Section 3 of S.L. 2004, ch. 122 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in §§ 18-8303, 18-8306, 18-8307, 18-8310, 18-8316, 18-8403 and 19-5506.

Constitutionality.

Because the language in § 18-8302 encompassing those who live within their local law enforcement jurisdiction, read together with the terms "resides" or "temporarily domiciled" in this section is sufficient for those of ordinary intelligence to understand the conduct that is required, this section is not unconstitutionally vague. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

18-8305. Central registry — Notice to agencies. — (1) The department shall establish and maintain a central sexual offender registry separate from other records maintained by the department. The registry shall include, but is not limited to, fingerprints, photographs, and other information collected from submitted forms and other communications relating to notice of duty to register, sexual offender registration and notice of address change.

(2) Upon receipt of information pursuant to section 18-8307, Idaho Code, the department shall notify the law enforcement agencies having jurisdiction where the offender resides or will reside, enter information in the central registry, and transmit the appropriate information as required by the federal bureau of investigation for inclusion in the national sexual offender registry. Upon receipt of a notice of an offender changing residence to another state, the department shall notify the central registry of the state to which the offender is moving. The department shall adopt rules relating to providing notice of address changes to law enforcement agencies, developing forms, operating the central registry, reviewing and correcting records, and expunging records of persons who are deceased, whose convictions have been reversed or who have been pardoned, and those for whom an order of expungement or relief from registration has been entered pursuant to section 18-8310, Idaho Code.

(3) The department shall develop and distribute to appropriate agencies the standardized forms necessary for the administration of the registry and shall provide appropriate agencies with instructions for completing and submitting the forms. The attorney general shall approve the forms and instructions prior to distribution. [I.C., § 18-8305, as added by 1998, ch. 411, § 2, p. 1275.]

Compiler's notes. Former § 18-8305 was repealed. See Compiler's note, § 18-8301.

Sec. to sec. ref. This section is referred to in § 18-8404.

18-8305A. Exemption from lifetime registration. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 18-8305A, as added by

1996, ch. 249, § 2, p. 784, was repealed by S.L. 1998, ch. 411, § 1, effective July 1, 1998.

18-8306. Notice of duty to register and initial registration. —

(1) When a person is sentenced for an offense identified in section 18-8304, Idaho Code, the prosecuting attorney shall seek and the court shall order a designated law enforcement agency to immediately fingerprint that person unless the person has been fingerprinted and photographed previously for the same offense. Fingerprints and photographs may be taken at the jail or correctional facility to which the person is remanded or sentenced. The fingerprints and photographs taken pursuant to this subsection shall be submitted to the department as provided in section 67-3005, Idaho Code.

(2) A person convicted of an offense identified in section 18-8304, Idaho Code, and released on probation without a sentence of incarceration in a county jail or correctional facility, including release pursuant to a withheld judgment or release from any mental institution, shall be notified by the sentencing court of the duty to register pursuant to the provisions of this chapter. The written notification shall be a form provided by the department and approved by the attorney general and shall be signed by the defendant. The court shall retain one (1) copy, provide one (1) copy to the offender, and submit one (1) copy to the central registry within three (3) working days of release.

(3) With respect to an offender convicted of a sexual offense identified in section 18-8304, Idaho Code, and sentenced to a period of incarceration in a jail or correctional facility and subsequently released, placed on probation, or paroled, the department of correction or jail shall provide, prior to release from confinement, written notification of the duty to register. The written notification shall be a form provided by the department and approved by the attorney general and shall be signed by the offender. The department of correction or jail shall retain one (1) copy, provide one (1) copy to the offender, and submit one (1) copy to the central registry within three (3) working days of release.

(4) The sheriff of each county shall provide written notification, on a form provided by the Idaho transportation department and approved by the attorney general, of the registration requirements of this chapter to any person who enters this state from another jurisdiction and makes an application for an identification card or a license to operate a motor vehicle in this state. The written notice shall be signed by the person and one (1) copy shall be retained by the sheriff's office and one (1) copy shall be provided to the person.

(5) Notification of the duty to register as set forth in subsections (2) and (3) of this section shall constitute an initial registration for the purpose of establishing a record in the central registry.

(6) The notification form provided by the department and approved by the attorney general shall:

- (a) Explain the duty to register, the procedure for registration and penalty for failure to comply with registration requirements;
- (b) Inform the offender of the requirement to provide notice of any change of address within Idaho or to another state within five (5) working days of such change;
- (c) Inform the offender of the requirement to register in a new state within ten (10) days of changing residence to that state; and
- (d) Obtain from the offender and agency or court, information required for initial registration in the central registry, as prescribed by rules promulgated by the department.

(7) The official conducting the notice and initial registration shall ensure that the notification form is complete, that the offender has read and signed the form, and that a copy is forwarded to the central repository within the required time period.

(8) Information required for initial registration in the central registry shall include, but is not limited to: name and aliases of the offender; social security number; physical descriptors; current address or physical description of current residence; offense for which convicted, sentence and conditions of release; treatment or counseling received; and risk assessment or special category of offender.

(9) No person subject to registration shall willfully furnish false or misleading information when complying with registration and notification requirements of this chapter. [I.C., § 18-8306, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 249, § 4, p. 638; am. 1999, ch. 302, § 2, p. 753; am. 2004, ch. 126, § 2, p. 422.]

Compiler's notes. Former § 18-8306 was repealed. See Compiler's note, § 18-8301.

This section was amended by two 1999 acts, ch. 249, § 4 and ch. 302, § 2 which appear to be compatible and have been compiled together.

The 1999 amendment by ch. 249, § 4 substituted "67-3005" for "67-2911" in subsection (1).

The 1999 amendment by ch. 302, § 2 inserted "working" preceding "days of such change" in subdivision (6)(b).

Section 3 of S.L. 1999, ch. 249 is compiled as § 9-340B.

Section 1 of S.L. 1999, ch. 302 is compiled as § 18-8304.

Sections 1 and 3 of S.L. 2004, ch. 126 are compiled as §§ 18-8002A and 49-301, respectively.

Purpose.

The clear purpose of subsection (2) of this section is to ensure that persons required to register as sex offenders under the Sex Offenders Registration Act are made aware of their duty to register before being discharged from custody. As it was clear defendant convicted of failing to register had been notified of this obligation in writing, failure to instruct on the requirements of subsection (2) of this section was harmless. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

18-8307. Local and annual registration. — (1)(a) Within ten (10) days of coming into any county to establish residence or temporary domicile, an offender shall register with the sheriff of the county. Individuals registered under the prior sex offender registration act, including those who registered within twelve (12) months of the effective date of this act, shall register with the sheriff of the county of residence within ten (10) days of the effective date of this act. The offender thereafter shall update the registration annually. If the offender intends to reside in another state, the offender shall register in the other state within ten (10) days of moving to that state.

(b) Nonresidents required to register pursuant to subsection (1)(d) of section 18-8304, Idaho Code, shall register with the sheriff of the county where employed or enrolled as a student within ten (10) days of the commencement of employment or enrollment as a student in an educational institution; provided that nonresidents employed in counseling, coaching, teaching, supervising or working with minors in any way regardless of the period of employment, must register prior to the commencement of such employment.

(2) Annual registration shall be conducted as follows:

(a) On or about the first day of the month containing the anniversary date of the initial registration, the department shall mail a non-forwardable notice of annual registration to the offender's last reported address;

(b) Within ten (10) days of the mailing date of the notice, the offender shall appear in person at the office of the sheriff with jurisdiction for the purpose of completing the registration process;

(c) If the notice is returned to the department as not delivered, the department shall inform the sheriff with whom the offender last registered of the returned notice.

(3) Registration, whether initial or annual, shall consist of a form provided by the department and approved by the attorney general, which shall be signed by the offender and shall require the following information about the offender:

(a) Name and all aliases which the person has used or under which the person has been known;

(b) A complete description of the person including the date of birth and social security number;

(c) Name of each offense enumerated in section 18-8304, Idaho Code, of which the person was convicted, where each offense was committed, where the person was convicted of each offense, and the name under which the person was convicted of each offense;

(d) The name and location of each hospital, jail or penal institution to which the person was committed for each offense covered under this chapter;

(e) School or college enrollment; and

(f) Address or physical description of current residence and place of employment.

(4) At the time of registration, the sheriff shall obtain a photograph and fingerprints, in a manner approved by the department, and may require the offender to provide full palm print impressions of each hand. An offender shall pay a fee of ten dollars (\$10.00) to the sheriff at the time of each registration. The sheriff may waive the registration fee if the offender demonstrates indigency. The fees collected under this section shall be used by the sheriff to defray the costs of sexual offender registration.

(5) The sheriff shall forward the completed and signed form, photograph and fingerprints to the department within three (3) working days of the registration.

(a) The official conducting the initial registration shall ensure that the notification form is complete and that the offender has read and signed the form.

(b) No person subject to registration shall furnish false or misleading information when complying with registration and notification requirements of this chapter.

(6) The sheriff, or appointed deputies, may visit the residence of a registered sexual offender within the county at any reasonable time to verify the address provided at the time of registration.

(7) All written notifications of duty to register as provided herein shall include a warning that it is a felony as provided in section 18-8327, Idaho Code, for an offender to accept employment in any day care center, group day care facility or family day care home, as those terms are defined in chapter 11, title 39, Idaho Code, or to be upon or to remain on the premises of a day care center, group day care facility or family day care home while children are present, other than to drop off or pick up the offender's child or children. [I.C., § 18-8307, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 302, § 3, p. 753; am. 1999, ch. 349, § 3, p. 932; am. 2004, ch. 270, § 4, p. 752.]

Compiler's notes. Former § 18-8307 was repealed. See Compiler's note, § 18-8301.

The words "effective date of this act" in subdivision (1)(a) refer to S.L. 1999, ch. 349, effective July 1, 1999.

This section was amended by two 1999 acts, ch. 302, § 3 and ch. 349, § 3, which appear to be compatible and have been compiled together.

The 1999 amendment by ch. 302, § 3 added the second sentence in subsection (1).

The 1999 amendment by ch. 349, § 3 added the subdivision (a) designation, added the second sentence in subdivision (1)(a), and added subdivision (1)(b).

Section 4 of S.L. 1999, ch. 302 is compiled as § 18-8309.

Section 2 of S.L. 1999, ch. 349 is compiled as § 18-8304.

Sections 3 and 5 of S.L. 2004, ch. 270 are compiled as §§ 20-505 and 18-8407, respectively.

Sec. to sec. ref. This section is referred to in §§ 18-8305, 18-8324 and 18-8407.

ANALYSIS

Evidence.

—Relevant.

Excuse.

Instructions.

Registration period.

Sentence.

—Not excessive.

Evidence.

—Relevant.

The district court correctly ruled that welfare worker's testimony, that defendant listed that county as his residency on a welfare application, was relevant on the issue of where defendant resided for purposes proving violation of the Sex Offender Registration Act. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

Excuse.

Although waived on appeal, defendant's claim that a domestic violence protection order prohibited him from registering at the driver's license bureau due to its proximity to his former wife's place of employment had no factual support because deputy testified that if necessary he would go to the location of the person seeking registration on any day of the week. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

Instructions.

District court properly rejected defendant's requested instructions defining residence and domicile because they are terms of common understanding and because the proposed instructions did not define the actual terms used in the statute; jury was instructed in the language of the statute and that was sufficient. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

Registration Period.

A reading of the Sex Offender Registration Act indicates that the legislature specifically intended to include Saturdays, Sundays, and holidays within the five day registration period of this section.

Sentence.

—Not Excessive.

Where district court had the benefit of presentence investigation report containing a great deal of information about defendant's background and character, defendant refused to be interviewed by the presentence investigator or otherwise cooperate in completing the report, and defendant's prior criminal history included the rape of his 15-year-old daughter, five-year indeterminate sentence for failing to register under Sex Offender Registration Act was not excessive. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

18-8308. Verification of address of violent sexual predator. —

(1) The address or physical residence of an offender designated as a violent sexual predator shall be verified by the department every ninety (90) days between annual registrations.

(2) The procedure for verification shall be as follows:

(a) The department shall mail a nonforwardable notice of address verification quarterly, between annual registrations, to each offender designated as a violent sexual predator.

(b) Each offender designated as a violent sexual predator shall complete, sign and return the notice of address verification form to the department within ten (10) days of the mailing date of the notice.

(c) If the notice of address verification is returned to the department as not delivered, the department shall notify the sheriff with whom the offender designated as a violent sexual predator last registered. [I.C., § 18-8308, as added by 1998, ch. 411, § 2, p. 1275.]

Compiler's notes. Former § 18-8308 was repealed. See Compiler's note, § 18-8301.

Sec. to sec. ref. This section is referred to in §§ 18-8324 and 19-5506.

18-8309. Change of address or name. — (1) If an offender changes address or actual residence, the offender shall provide written notice of the new address within five (5) working days after the change to the sheriff of

the county where the offender is required to register. The notice shall be on a form provided by the department. Within three (3) working days after receipt of the notice, the sheriff shall forward a copy of the notice to the department.

(2) If an offender changes address to another state, the offender shall provide written notice of the new address within five (5) working days after the change to the department.

(3) An offender whose legal name is changed by marriage, judicial order or any other means shall provide written notice of the name change to the sheriff and the department within five (5) working days of the order, event or other occurrence. [I.C., § 18-8309, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 302, § 4, p. 753.]

Compiler's notes. Former § 18-8309 was repealed. See Compiler's note, § 18-8301.

Sec. to sec. ref. This section is referred to in § 18-8407.

Sections 3 and 5 of S.L. 1999, ch. 302 are compiled as §§ 18-8307 and 18-8317, respectively.

18-8310. Release from registration requirements — Expungement. — (1) Any person, other than a recidivist, an offender who has been convicted of an aggravated offense, or an offender designated as a violent sexual predator, may, after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person shall be exempted from the duty to register as a sexual offender. In the petition the petitioner shall:

- (a) Provide clear and convincing evidence that the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code;
- (b) Provide an affidavit indicating that the petitioner does not have a criminal charge pending nor is the petitioner knowingly under criminal investigation for any violent crime or crime identified in section 18-8304, Idaho Code;
- (c) Provide proof of service of such petition upon the county prosecuting attorney for the county in which the application is made; and
- (d) Provide a certified copy of the judgment of conviction which caused the petitioner to report as a sexual offender.

The district court may grant a hearing if it finds that the petition is sufficient. The court shall provide at least sixty (60) days' prior notice of the hearing to the petitioner and the county prosecuting attorney.

The court may exempt the petitioner from the reporting requirement only after a hearing on the petition in open court and only upon proof by clear and convincing evidence that the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code.

(2) Concurrent with the entry of any order exempting the petitioner from the reporting requirement, the court may further order that any information regarding the petitioner be expunged from the central registry. [I.C.,

§ 18-8310, as added by 1998, ch. 411, § 2, p. 1275; am. 2000, ch. 236, § 2, p. 663; am. 2001, ch. 194, § 3, p. 659.]

Compiler's notes. Former § 18-8310 was repealed. See Compiler's note, § 18-8301.

Section 1 of S.L. 2000, ch. 236 is compiled as § 18-8303.

Section 2 of S.L. 2001, ch. 194 is compiled as § 18-8304.

Sec. to sec. ref. This section is referred to in §§ 18-8305 and 18-8407.

ANALYSIS

Burden of proof.

Remedial nature of requirement.

Burden of Proof.

Idaho Code § 18-8310 required the trial court to find by clear and convincing evidence that a petitioner be not a risk to commit a new

violation before releasing that petitioner from the sex offender registration requirement; Idaho Code § 18-8310 provided only a mechanism under which a sex offender could petition for relief from the sex offender registration requirement, but that it did not mandate relief and the feacher did not carry his very heavy burden of proof of showing that he was not a risk to re-offend. *State v. Knapp*, — Idaho —, 79 P.3d 740 (Ct. App. 2003).

Remedial Nature of Requirement.

The fact that registrants can petition to be released from the registration requirements after ten years lessens the punitive aspect of the requirement. *Ray v. State*, 133 Idaho 96, 982 P.2d 931 (1999).

18-8311. Penalties. — (1) An offender subject to registration who fails to register or provide any notice as required by this chapter shall be guilty of a felony and shall be punished by imprisonment in the state prison system for a period not to exceed five (5) years and by a fine not to exceed five thousand dollars (\$5,000). If the offender is on probation or other supervised release or suspension from incarceration at the time of the violation, the probation or supervised release or suspension shall be revoked and the penalty for violating this chapter shall be served consecutively to the offender's original sentence.

(2) An offender subject to registration under this chapter, who willfully provides false or misleading information in the registration required, shall be guilty of a felony and shall be punished by imprisonment in a state prison for a period not to exceed five (5) years and a fine not to exceed five thousand dollars (\$5,000).

(3) An offender subject to registration under this chapter, who willfully evades service of the board's notice pursuant to section 18-8319, Idaho Code, shall be guilty of a felony and shall be punished by imprisonment in a state prison for a period not to exceed five (5) years and a fine not to exceed five thousand dollars (\$5,000). [I.C., § 18-8311, as added by 1998, ch. 411, § 2, p. 1275; am. 2000, ch. 236, § 3, p. 663.]

Compiler's notes. Former § 18-8311 was repealed. See Compiler's note, § 18-8301.

Section 4 of S.L. 2000, ch. 236 is compiled as § 18-8314.

18-8312. Sexual offender classification board — Appointment — Terms — Vacancies — Chairman — Quorum — Qualifications of members — Compensation of members. — (1) A sexual offender classification board is hereby created within the Idaho department of correction. The board shall consist of four (4) members appointed by the governor by and with the advice and consent of the senate. The purpose of the board shall be to assess the risk of reoffense of any offender convicted and incarcerated for commission of a crime as set forth in section 18-8314, Idaho

Code, to determine whether the offender should be designated a violent sexual predator. To the extent practicable, the board's determination shall be made prior to the offender's release from incarceration.

(2) The terms of the members shall expire as follows: one (1) member on January 1, 2001; one (1) member on January 1, 2002; one (1) member on January 1, 2003; and one (1) member on January 1, 2004. Thereafter, any person appointed a member of the board shall hold office for six (6) years.

(3) Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made. Members appointed to a vacant position shall serve the remainder of the unexpired term.

(4) Qualifications of members.

(a) At least one (1) member of the board shall have, by education, experience and training, expertise in the assessment and treatment of sexual offenders.

(b) At least one (1) member of the board shall be employed in the field of law enforcement and have training in the field of the behavior and treatment of sexual offenders.

(c) At least one (1) member of the board shall be an advocate for victims of offenders.

(5) The board shall elect a chairman from its members.

(6) A quorum shall exist when at least three (3) members of the board are present, provided that one (1) member present has, by education, experience and training, expertise in the assessment and treatment of sexual offenders.

(7) Members shall be compensated as provided by section 59-509(o), Idaho Code. [I.C., § 18-8312, as added by 1998, ch. 411, § 2, p. 1275; am. 2002, ch. 183, § 2, p. 532.]

Compiler's notes. Sections 1 and 3 of S.L. 2002, ch. 183 are compiled as §§ 18-8303 and 18-8314, respectively.

Cited in: State v. Knapp, — Idaho —, 79 P.3d 740 (Ct. App. 2003).

Sec. to sec. ref. This section is referred to in § 18-8303.

18-8313. Removal of board members. — The governor may remove members of the board for reasons of inefficiency, neglect of duty, malfeasance in office, commission of a felony or inability to perform the duties of office. [I.C., § 18-8313, as added by 1998, ch. 411, § 2, p. 1275.]

18-8314. Powers and duties of the sexual offender classification board. — (1) The board shall consider for review offenders scheduled for release from incarceration who are referred by the department of correction or parole commission to determine whether the offender should be designated as a violent sexual predator presenting a high risk of reoffense. Only offenders who were sentenced and convicted for one (1) or more of the crimes set forth in sections 18-1506, 18-1506A, 18-1508, 18-4003(d), 18-4502, 18-6101 (but excluding subsection 1. of such section when the offender is eighteen (18) years of age or younger), 18-6108, 18-6602, 18-6605 and 18-6608, Idaho Code, or are recidivists as defined in this chapter, are eligible for review by the board.

(2) The board shall consider for review offenders who were sentenced and convicted for one (1) or more crimes enumerated in subsection (1) of this section, who have been released under supervision, for the purpose of determining whether the offender should be designated as a violent sexual predator presenting a high risk of reoffense. Such review shall be undertaken upon request of the district court having jurisdiction over the offender on probation or of the parole commission if the offender has been released on parole regardless of whether the offender has been reviewed by the board prior to release from incarceration. For purposes of seeking a board review pursuant to this subsection, the court or parole commission may consider all relevant evidence including, but not limited to, the probation or parole official's observations and opinions of these offenders while under supervision, in light of the circumstances of the underlying offense.

(3) The board shall consider for review offenders living in Idaho who were sentenced and convicted for one (1) or more crimes enumerated in subsection (1) of this section, or substantially equivalent to those enumerated in subsection (1) of this section and committed in another state, territory, commonwealth or other jurisdiction of the United States, including tribal courts and military courts, and who have been released under federal or tribal court supervision. Such review shall be for the purpose of determining whether the offender should be designated as a violent sexual predator presenting a high risk of reoffense, and shall be undertaken upon request of the federal or tribal court having jurisdiction over the offender. For purposes of seeking a board review pursuant to this subsection, the federal or tribal court may consider all relevant evidence including, but not limited to, the probation official's observations and opinions of these offenders while under supervision, in light of the circumstances of the underlying offense.

(4) The board shall by rule:

(a) Establish standards for psychosexual evaluations and the qualifications for certified evaluators performing evaluations pursuant to sections 18-8316 and 18-8317, Idaho Code.

(b) Set forth procedures for the approval, certification and quality assurance of evaluators pursuant to this section.

(c) Establish a nonrefundable initial certification processing fee not to exceed one hundred fifty dollars (\$150) and a nonrefundable annual recertification processing fee not to exceed one hundred fifty dollars (\$150).

(5) The board shall establish guidelines to determine whether an offender who meets the criteria of this section is a violent sexual predator presenting a high risk of reoffense. The guidelines shall be established with the assistance of sexual offender treatment and law enforcement professionals who have, by education, experience or training, expertise in the assessment and treatment of sexual offenders.

(a) Factors to be used in establishment of the guidelines must be supported in the sexual offender assessment field as criteria reasonably related to the risk of reoffense and be objective criteria that can be gathered in a consistent and reliable manner.

(b) The guidelines shall include, but are not limited to, the following general categories for risk assessment: seriousness of the offense, offense

history, whether the offense was predatory, characteristics of the offender, characteristics of the victim, the relationship of the offender to the victim, the number of victims and the number of violations of each victim.

(6) If the offender has indicated an intention to reoffend if released into the community and the available record reveals credible evidence to support this finding, then the offender shall be deemed a violent sexual predator regardless of application of the guidelines.

(7) Once the board has made its determination, it shall set forth written findings which shall include:

(a) The board's risk assessment and the reasons upon which the risk assessment was based; and

(b) The board's determination whether the offender should be designated as a violent sexual predator and the reasons upon which the determination was based.

(8) The board shall have authority to promulgate rules to carry out the provisions of this chapter. [I.C., § 18-8314, as added by 1998, ch. 411, § 2, p. 1275; am. 2000, ch. 235, § 1, p. 661; am. 2000, ch. 236, § 4, p. 663; am. 2002, ch. 183, § 3, p. 532; am. 2003, ch. 235, § 2, p. 602; am. 2004, ch. 125, § 2, p. 416.]

Compiler's notes. This section was amended by two 2000 acts — ch. 235, § 1, effective April 12, 2000 and ch. 236, § 4, effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 235, § 1, in subsection (1), substituted "review offenders" for "evaluate offenders", inserted ", or are recidivists as defined in this chapter" preceding "for the purpose of determining"; added present subsection (2); and redesignated former subsections (2) through (5) as present subsections (3) through (6).

The 2000 amendment by ch. 236, § 4, in subsection (1), substituted "review offenders" for "evaluate offenders", and inserted ", or are recidivists as defined in this chapter" preceding "for the purpose of determining".

Sections 3 and 5 of S.L. 2000, ch. 236 are compiled as §§ 18-8311 and 18-8319, respectively.

Section 2 of S.L. 2002, ch. 183 is compiled as § 18-8312.

Sections 1 and 3 of S.L. 2003, ch. 235 are compiled as §§ 18-8303 and 18-8316, respectively.

Section 1 of S.L. 2004, ch. 125 is compiled as § 18-8303.

Section 2 of S.L. 2000, ch. 235 declared an emergency. Approved April 12, 2000.

Section 6 of S.L. 2004, ch. 125 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in §§ 18-8303, 18-8312, 18-8316 and 18-8317.

Cited in: State v. Knapp, — Idaho —, 79 P.3d 740 (Ct. App. 2003).

18-8315. Compliance with open meeting law — Executive sessions authorized — Report required. — (1) All meetings of the board shall be held in accordance with the open meeting law as provided in chapter 23, title 67, Idaho Code, except:

(a) Consideration of and discussions pertaining to documents not subject to public disclosure, such as the presentence investigation report, certain medical or psychological reports and any reports, orders or other documents sealed by court order;

(b) Deliberations and decisions concerning the classification of violent sexual predators; and

(c) Votes of individual members in arriving at the classification decisions shall not be made public, provided that the board shall maintain a record of the votes of the individual members as required in subsection (2) of this section.

(2) A written record of the vote to classify an offender as a violent sexual predator by each board member in each case reviewed by that member shall be produced by the board. In accordance with section 9-340B, Idaho Code, the record produced by the board pursuant to this section shall be kept confidential and privileged from disclosure, provided the record shall be made available, upon request, to the governor and the chairman of the senate judiciary and rules committee and the chairman of the house of representatives judiciary, rules and administration committee, for all lawful purposes. Distribution of the report by a board member or an employee of the board to any person not specifically listed in this section shall be a misdemeanor.

(3) Nothing contained in this section shall prevent any person from obtaining the results of any classification action by the board without reference to the manner in which any member voted. This information can be obtained through a public records request made to the board.

(4) Nothing contained herein shall prevent the governor and chairman of the senate judiciary and rules committee and the chairman of the house of representatives judiciary, rules and administration committee from attending any meeting including an executive session of the sexual offender classification board. [I.C., § 18-8315, as added by 1998, ch. 411, § 2, p. 1275; am. 2000, ch. 469, § 31, p. 1450; am. 2004, ch. 125, § 3, p. 416.]

Compiler's notes. Sections 30 and 32 of S.L. 2000, ch. 469 are compiled as §§ 18-8303 and 18-8404, respectively.

Section 4 of S.L. 2004, ch. 125 is compiled as § 18-8317.

Section 6 of S.L. 2004, ch. 125 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in § 9-340B.

18-8316. Requirement for psychosexual evaluations upon conviction. — If ordered by the court, an offender convicted of any offense listed in section 18-8304, Idaho Code, shall submit to an evaluation to be completed and submitted to the court in the form of a written report from a certified evaluator as defined in section 18-8303, Idaho Code, for the court's consideration prior to sentencing and incarceration or release on probation. The court shall select the certified evaluator from a central roster of evaluators compiled by the sexual offender classification board. A certified evaluator performing such an evaluation shall be disqualified from providing any treatment ordered as a condition of any sentence, unless waived by the court. For offenders convicted of an offense listed in section 18-8314, Idaho Code, the evaluation shall state whether it is probable that the offender is a violent sexual predator. An evaluation conducted pursuant to this section shall be done in accordance with the standards established by the board pursuant to section 18-8314, Idaho Code. [I.C., § 18-8316, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 380, § 1, p. 1044; am. 2003, ch. 235, § 3, p. 602.]

Compiler's notes. Section 2 of S.L. 2003, ch. 235 is compiled as § 18-8314.

Sec. to sec. ref. This section is referred to in §§ 18-8314, 18-8317, 18-8318.

18-8317. Requirement for psychosexual evaluations upon release. — Every offender who meets the criteria set forth in section 18-8314, Idaho Code, and has been considered by the board and deemed appropriate for review for violent sexual predator designation, shall submit to psychosexual evaluation. Every incarcerated offender whose evaluation under section 18-8316, Idaho Code, states that the offender is a probable violent sexual predator, shall submit to a psychosexual evaluation and shall be reviewed by the board. The purpose of the evaluation is for assessing risk of reoffense and to determine whether the offender should be designated as a violent sexual predator. If the offender is incarcerated, the evaluation is to be performed prior to release from incarceration. These evaluations shall be performed either by a certified evaluator as defined in section 18-8303, Idaho Code, or a mental health professional employed by the department of correction. The individual performing an evaluation under this section shall not be a member of the sexual offender classification board at the time the evaluation is performed. The individual performing the evaluation shall be disqualified from providing any treatment ordered or attached as a condition of parole, unless waived by the department of correction. An evaluation conducted pursuant to this section shall be done in accordance with the standards established by rule of the board pursuant to section 18-8314, Idaho Code. [I.C., § 18-8317, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 302, § 5, p. 753; am. 2003, ch. 235, § 4, p. 602; am. 2004, ch. 125, § 4, p. 416.]

Compiler's notes. Section 4 of S.L. 1999, ch. 302 is compiled as § 18-8309.

Sections 3 and 5 of S.L. 2004, ch. 125 are compiled as §§ 83-8315 and 83-8319, respectively.

Section 6 of S.L. 2004, ch. 125 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in §§ 18-8314 and 18-8318.

18-8318. Offender required to pay for psychosexual evaluation. — The offender shall be required to pay for the cost of the psychosexual evaluations performed under this chapter, unless the offender demonstrates indigency. In such case, the psychosexual evaluation performed pursuant to section 18-8316, Idaho Code, shall be paid for by the county, and the evaluation performed pursuant to section 18-8317, Idaho Code, shall be paid for by the department of correction. As a condition of sentence, indigent offenders for whom the county has paid the cost of evaluation performed pursuant to section 18-8316, Idaho Code, shall be required to repay the county for the cost. [I.C., § 18-8318, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 302, § 6, p. 753.]

Compiler's notes. Section 7 of S.L. 1999, ch. 302 is compiled as § 18-8323.

18-8319. Notice of the board's determination. — (1) Subject to the exception identified in section 18-8320, Idaho Code, the offender and the sheriff of the county in which the offender resides or intends to reside upon release shall be notified by the board that an offender has been designated

as a violent sexual predator. This notice shall be in the form of the board's written findings.

(2) The board shall serve a copy of its written findings to the offender within ten (10) working days of the date that designation has been made. Service of the written findings will be made upon the sheriff in accordance with the offender's status.

(a) Notice shall be served upon the sheriff of the county in which the offender resides within ten (10) working days of the date that designation has been made, if the offender is not incarcerated.

(b) If the offender is awaiting release from incarceration, notice shall be made upon the sheriff of the county in which the offender intends to reside no less than seven (7) days prior to the offender's release.

(c) In the event the offender has not specified a residence plan prior to his release, notice shall be made upon the sheriff of the county in which the offender is released from incarceration, and upon the sheriff of the county in which the offender initially resides and registers after release.

(3) The board's notice to the offender shall also inform the offender:

(a) That the offender may challenge the designation as a violent sexual predator by judicial review;

(b) That unless application is made to the applicable district court on or before the date set forth in the notice, which shall be no more than fourteen (14) calendar days after the notice is given, the offender shall be deemed to have waived the right to challenge the designation;

(c) The applicable district court shall be determined as:

(i) The county in which the offender resides if the offender has been released from incarceration; or

(ii) The county in which the offender intends to reside if the offender has not been released from incarceration; or

(iii) If the offender intends to reside in another state, territory, commonwealth or other jurisdiction of the United States immediately upon release from incarceration, the county in which the offender was most recently convicted of an offense as listed in section 18-8314, Idaho Code;

(d) That the offender has the right to retain counsel and that counsel will be provided by the court if the offender cannot afford counsel; and

(e) How such application should be made if counsel is not retained. If counsel is not retained, notice filed with the district court in the applicable county, which encloses a copy of the board's written findings and indicates the offender's objection or disagreement with it, shall suffice.

(4) Upon determining that the offender has not received the board's notice pursuant to this section, the board shall notify the sheriff of the county in which the offender resides. This notice shall be in writing and shall be delivered in a manner which will ensure receipt by the sheriff. Upon request of the board, the sheriff may personally serve the offender with the board's notice, or the sheriff may verify the offender's address and advise the board in order that notice may once again be served. If, after the second attempt to serve the offender, the board or sheriff determines that the offender has evaded service or attempted to evade service, the matter shall be referred for prosecution pursuant to section 18-8311(3), Idaho Code. [I.C.,

§ 18-8319, as added by 1998, ch. 411, § 2, p. 1275; am. 2000, ch. 236, § 5, p. 663; am. 2000, ch. 237, § 1, p. 667; am. 2001, ch. 200, § 1, p. 680; am. 2001, ch. 286, § 1, p. 1021; am. 2004, ch. 125, § 5, p. 416.]

Compiler's notes. This section was amended by two 2000 acts — ch. 236, § 5 and ch. 237, § 1, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 236, § 5, in subdivision (3)(b), substituted “more than fourteen” for “less than fourteen”.

The 2000 amendment by ch. 237, § 1 added subsection (4).

This section was amended by two 2001 acts which appear to be compatible and have been compiled together.

The 2001 amendment by ch. 200, § 1, in subsection (b), inserted “district” preceding “court”; inserted “if the offender has been

released from incarceration,” following “the offender resides”; “the county where the offender” preceding “intends to reside”; “if the offender has not been released from incarceration,” preceding “on or before”;

The 2001 amendment by ch. 286, § 1, rewrote subsection (2) and added subsections (2)(a) through (2)(c).

Section 4 of S.L. 2000, ch. 236 is compiled as § 18-8314.

Section 4 of S.L. 2004, ch. 125 is compiled as § 18-8317.

Section 6 of S.L. 2004, ch. 125 declared an emergency. Approved March 19, 2004.

Sec. to sec. ref. This section is referred to in § 18-8311.

18-8320. Exception to notice of board's classification determination to offender. — Beginning with the effective date [July 1, 1998] of this chapter, if an offender avoids service of the notice of the board's designation of the offender as a violent sexual predator, or if after a good faith effort to serve the offender, service has not been completed within ten (10) working days of the date that designation has been made, notice to the offender may be dispensed with and the offender shall be deemed to have waived the right to judicial review as otherwise provided in this chapter. [I.C., § 18-8320, as added by 1998, ch. 411, § 2, p. 1275.]

Sec. to sec. ref. This section is referred to in § 18-8319.

18-8321. Judicial review. — (1) Judicial review of an offender's challenge to the designation as a violent sexual predator is civil, not criminal, and remedial, not adversarial.

(2) Immediately upon receipt of an offender's objection or challenge to the designation as a violent sexual predator, the court shall set a date for a summary hearing.

(3) Upon notification of a date for a summary hearing, the prosecutor shall forthwith turn over all papers, documents and other relevant material to the court. A written summarization of information relied upon by the sexual offender classification board may be made available to the offender. However the following documents produced by the sexual offender classification board shall be withheld from disclosure and available only for in camera review by the court:

(a) Records that contain names and addresses, identifying information or any information that would lead to the identification of any victims or witnesses;

(b) Written statements or testimony of victims, witnesses, guardians or persons representing victims or witnesses;

(c) Reports prepared specifically for use by the commission for pardons and parole in making parole determinations pursuant to section 20-223, Idaho Code; and

(d) Other records to remain confidential consistent with rules of criminal or civil procedure.

(4) Judicial review under this chapter shall be conducted as a summary, in camera review proceeding, in which the court decides only whether to affirm or reverse the board's designation of the offender as a violent sexual predator.

(5) The court shall have broad discretion over whether and to what extent witnesses and cross-examination will be allowed.

(6) The rules of evidence do not apply.

(7) The court may rely on documentary evidence, such as expert opinions, for all issues.

(8) Nonconviction offense, i.e., criminal activity that has not been the subject of a conviction, shall be considered in review of the board's designation, provided that there is sufficient evidence that the nonconviction offense occurred.

(9) Where the proof, whether in the form of reliable hearsay, affidavits, or offers of live testimony, creates a genuine issue of material fact as to whether the offender is a violent sexual predator, the court should convene a fact-finding hearing and permit live testimony.

(10) The state bears the burden of presenting a prima facie case that justifies the designation as a violent sexual predator.

(11) The court shall affirm the board's determination unless persuaded by a preponderance of the evidence that it does not conform to the law or the guidelines.

(12) The offender is entitled to challenge the designation as a violent sexual predator based upon two (2) grounds:

(a) The offender may introduce evidence that the calculation that led to the designation as a violent sexual predator was incorrectly performed either because of a factual error, because the offender disputes a prior offense, because the variable factors were improperly determined, or for similar reasons; and

(b) The offender may introduce evidence at the hearing that the designation as a violent sexual predator does not properly encapsulate the specific case, i.e., the offender may maintain that the case falls outside the typical case of this kind and, therefore, that the offender should not be designated as a violent sexual predator.

(13) Either party may appeal the decision of the court.

(14) Offenders who are not designated as violent sexual predators are not entitled to judicial review under this section. [I.C., § 18-8321, as added by 1998, ch. 411, § 2, p. 1275; am. 2002, ch. 182, § 1, p. 530.]

Compiler's notes. Section 2 of S.L. 2002, to January 1, 2002 and was approved March ch. 182 declared an emergency retroactively 21, 2002.

18-8322. Violent sexual predators moving from other states. —
Offenders moving to Idaho from other states who have been classified as

violent sexual offenders or given a substantially similar classification shall be classified violent sexual offenders under this chapter. Any offender who is so classified shall have the right to judicial review of the classification, but the burden of proof in such proceedings shall be upon the offender. [I.C., § 18-8322, as added by 1998, ch. 411, § 2, p. 1275.]

18-8323. Public access to sexual offender registry information. — Information within the sexual offender registry collected pursuant to this chapter is subject to release only as provided by this section.

(1) The department or sheriff shall provide public access to information contained in the central sexual offender registry. The department shall promulgate rules defining the processes for providing information to the public and the requirements for retention of inquiry records by the department and sheriff. The department may provide public access to the sex offender registry by means of the internet.

(2) The department and sheriff will respond to requests for sexual offender registry information within ten (10) working days of receipt of the written request.

(a) Any person may inquire about a named individual by submitting an information request form obtained from the department or sheriff. The department shall promulgate rules outlining the methods and means of submitting requests. Information required for inquiry shall include the individual's full name and address, or full name and date of birth. The requester shall provide his full name, street address and driver's license or social security number.

(b) Any person may request a list of registered sexual offenders by geographic area, such as by county or by zip code area, as determined by rule, by submitting an information request form obtained from the department or sheriff. The requester shall provide his full name, street address and driver's license, social security number, or state identification number.

(c) Schools, organizations working with youth, women or other vulnerable populations may request a statewide list or lists by geographic area within the state.

(d) The department and sheriff may collect a fee of five dollars (\$5.00) for each response to a written request.

(e) Information to be provided includes the offender's name, address, any aliases or prior names, date of birth, the crime of conviction, and the place of conviction. The information provided shall also state whether the offender is a violent sexual predator.

(f) Identity of the offender's employer or educational institution currently attended will not be provided for any registered sexual offender.

(g) Where a crime category such as "incest" may serve to identify a victim, that crime will be reported as section 18-1506, Idaho Code.

(h) Any information identifying any person related to, living with, working for, employing or otherwise associated with a registered sexual offender shall be excluded from release.

(3) The department shall provide to any person, upon written request and at a reasonable cost, determined by the department, a photograph of any

registered sexual offender which the department maintains in its central sexual offender registry. The department shall respond to requests for photographs within ten (10) working days of receipt.

(4) Fees received by the department pursuant to this section shall be deposited in the department's miscellaneous revenue fund and used to support the operation of the central registry. Fees received by the sheriff pursuant to this section shall be used to defray the cost of sexual offender registration.

(5) The department shall include a cautionary statement relating to completeness, accuracy and use of registry information when releasing information to the public or noncriminal justice agencies as well as a statement concerning the penalties provided in section 18-8326, Idaho Code, for misuse of registry information.

(6) Information released pursuant to this section may be used only for the protection of the public.

(7) Further dissemination of registry information by any person or entity shall include the cautionary statements required in subsection (5) of this section. [I.C., § 18-8323, as added by 1998, ch. 411, § 2, p. 1275; am. 1999, ch. 302, § 7, p. 753; am. 2001, ch. 195, § 1, p. 662.]

Compiler's notes. Section 6 of S.L. 1999, ch. 302 is compiled as § 18-8318.

Sec. to sec. ref. This section is referred to in § 18-8404.

Collateral References. Validity of state

statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution. 98 A.L.R.5th 167.

18-8324. Dissemination of registry information. — (1) The department shall disseminate any registration information collected under this chapter, including change of address notification, to criminal justice agencies through the telecommunications system established in section 19-5202, Idaho Code. Registry information provided under this section shall be used only for the administration of criminal justice or for the protection of the public as permitted by this chapter.

(2) The department shall provide quarterly to the superintendent of public instruction and to the director of the department of health and welfare a list of all sexual offenders required to register with the central registry together with the address, date of birth and crime of conviction for each offender listed. The superintendent may further distribute the list or portions thereof to school districts or to schools.

(3) The department shall release quarterly to the public a list of offenders thirty (30) days or more delinquent in maintaining registration or address verification. Offenders subject to being listed include those who have failed:

- (a) To register with a sheriff after initial registration under section 18-8307, Idaho Code;
- (b) To register annually as required in section 18-8307, Idaho Code; and
- (c) To respond to an address verification notice as required in section 18-8308, Idaho Code.

(4) The department shall include a cautionary statement relating to completeness, accuracy and use of registry information when releasing information to the public or noncriminal justice agencies as well as a

statement concerning the penalties provided in section 18-8326, Idaho Code, for misuse of registry information.

(5) Information released pursuant to this section may be used only for the protection of the public.

(6) Further dissemination of registry information by any person or entity shall include the cautionary statements required in subsection (4) of this section.

(7) Upon registration in a county of a person classified as a violent sexual predator presenting a high risk of reoffense by the Idaho sex offender classification board, or an equivalent classification in another state, the sheriff shall publish in a newspaper in general circulation within the county once a week for three (3) consecutive weeks, the name, address, photograph of said person and offense the offender has committed within thirty (30) days of registration. The sheriff shall charge a fee of fifty dollars (\$50.00) in addition to any other fees authorized by this chapter to be paid by the sex offender to offset the cost of publication. [I.C., § 18-8324, as added by 1998, ch. 411, § 2, p. 1275; am. 2003, ch. 28, § 1, p. 100.]

18-8325. Exemption from civil liability. — (1) No person or governmental entity, other than those specifically charged in this chapter with a duty to collect information under this chapter regarding registered sexual offenders, has a duty to inquire, investigate or disclose any information regarding registered sexual offenders.

(2) No person or governmental entity, other than those specifically charged in this chapter with an affirmative duty to provide public access to information regarding registered sexual offenders, shall be held liable for any failure to disclose any information regarding registered sexual offenders to any other person or entity.

(3) Every person or governmental entity who, acting without malice or criminal intent, obtains or disseminates information under this chapter shall be immune from civil liability for any damages claimed as a result of such disclosures made or received. [I.C., § 18-8325, as added by 1998, ch. 411, § 2, p. 1275.]

18-8326. Penalties for vigilantism or other misuse of information obtained under this chapter. — Any person who uses information obtained pursuant to this chapter to commit a crime or to cause physical harm to any person or damage to property shall be guilty of a misdemeanor and, in addition to any other punishment, be subject to imprisonment in the county jail for a period not to exceed one (1) year, or by a fine not to exceed one thousand dollars (\$1,000) or both. [I.C., § 18-8326, as added by 1998, ch. 411, § 2, p. 1275.]

Compiler's notes. Section 3 of S.L. 1998, ch. 411 is compiled as § 7-805.

Sec. to sec. ref. This section is referred to in §§ 18-8323 and 18-8324.

18-8327. Adult criminal sex offender — Prohibited employment. — (1) Except as provided in section 18-8328, Idaho Code, it is a felony for any person to: apply for or to accept employment at a day care center, group

day care facility or family day care home; or to be upon or to remain on the premises of a day care center, group day care facility or family day care home while children are present, other than to drop off or pick up the person's child or children if the person is currently registered or is required to register under the sex offender registration act as provided in chapter 83, title 18, Idaho Code.

(2) The owner or operator of any day care center, group day care facility or family day care home who knowingly employs a person or who knowingly accepts volunteer services from a person, which person is currently registered or is required to register under the sex offender registration act as provided in chapter 83, title 18, Idaho Code, to work in the day care center, group day care facility or family day care home is guilty of a misdemeanor unless judicial relief has been granted pursuant to section 18-8328, Idaho Code. [I.C., § 18-8327, as added by 2004, ch. 270, § 1, p. 752.]

Compiler's notes. Section 2 of S.L. 2004, ch. 270 is compiled as § 18-8414. **Sec. to sec. ref.** This section is referred to in §§ 18-8307 and 18-8328.

18-8328. Action for relief by offender or juvenile offender. — Any person who is required to register pursuant to chapter 83, title 18, Idaho Code, or chapter 84, title 18, Idaho Code, may file a petition in a district court in the judicial district where the person resides, to have relief from the provisions of section 18-8327 or 18-8414, Idaho Code, pertaining to employment in or being upon or remaining on the premises of a day care center, group day care facility or family day care home while children are present, other than to drop off or pick up the sex offender's or juvenile sex offender's child or children. To be granted relief pursuant to this section, the person shall show by clear and convincing evidence that the person required to register pursuant to chapter 83, title 18, Idaho Code, or chapter 84, title 18, Idaho Code, does not pose a threat to children in a day care center, group day care facility or family day care home, it has been at least ten (10) years since the person's last conviction, finding of guilt or adjudication that required the person to register pursuant to chapter 83, title 18, Idaho Code, or chapter 84, title 18, Idaho Code, and the petitioner presents testimony from a licensed physician or psychologist about the petitioner's chance of success of not committing an act against children. [I.C., § 18-8328, as added by 2004, ch. 270, § 6, p. 752.]

Compiler's notes. Section 5 of S.L. 2004, ch. 270 is compiled as § 18-8407. **Sec. to sec. ref.** This section is referred to in §§ 18-8414 and 18-8327.

CHAPTER 84

JUVENILE SEX OFFENDER REGISTRATION NOTIFICATION AND COMMUNITY
RIGHT-TO-KNOW ACT

SECTION.	SECTION.
18-8401. Short title.	18-8405. Notification of duty to register —
18-8402. Findings.	Probation.
18-8403. Definitions.	18-8406. Notification of duty to register —
18-8404. Juvenile sex offender registry.	Prior to release.

SECTION.

- 18-8407. Annual registration.
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18-8410. Transfer to adult registry.
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SECTION.

- 18-8412. Exemption from civil liability.
18-8413. Penalties for vigilantism or other misuse of information obtained under this chapter.
18-8414. Juvenile sex offender — Prohibited employment.

18-8401. Short title. — This chapter shall be known and may be cited as the “Juvenile Sex Offender Registration Notification and Community Right-to-Know Act.” [I.C., § 18-8401, as added by 1998, ch. 412, p. 1298.]

Sec. to sec. ref. This chapter is referred to in §§ 18-8327, 18-8328 and 18-8414.

Collateral References. Validity, construc-

tion, and application of state statutes authorizing community notification of release of convicted sex offender. 78 A.L.R.5th 489.

18-8402. Findings. — The legislature finds that juvenile sex offenders present a significant risk of reoffense and that efforts of law enforcement agencies to protect communities, conduct investigations and quickly apprehend offenders who commit sex offenses are impaired by the lack of information available about individuals who have been convicted or adjudicated delinquent of sex offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about sex offenders assists parents in the protection of their children. Further, such access provides a means for organizations that work with youth or other vulnerable populations to prevent juvenile sex offenders from threatening those served by the organizations. Finally, public access assists the public to be observant of convicted juvenile sex offenders in order to prevent the offenders from recommitting sex crimes. Therefore, this state’s policy is to assist efforts of local law enforcement agencies to protect communities by requiring juvenile sex offenders to register with local law enforcement agencies and to make certain information about juvenile sex offenders available to the public as provided in this chapter. [I.C., § 18-8402, as added by 1998, ch. 412, p. 1298.]

18-8403. Definitions. — As used in this chapter, “juvenile sex offender” means a person who was between fourteen (14) years of age to eighteen (18) years of age at the time the qualifying sex offense was committed and who:

(1) On or after July 1, 1998, was adjudicated delinquent under the juvenile corrections act for an action that would be an offense enumerated in section 18-8304, Idaho Code, if committed by an adult; or

(2) As of July 1, 1998, is serving formal probation, a period of detention, or commitment to the department of juvenile corrections as the result of sentencing imposed under section 20-520, Idaho Code, for an action that would be an offense enumerated in section 18-8304, Idaho Code, if committed by an adult; or

(3) Was adjudicated delinquent in another state for an action that is substantially equivalent to the offenses enumerated in section 18-8304, Idaho Code, and is subject on or after July 1, 1998, to Idaho court jurisdiction under the interstate compact on juveniles; or

(4) Is required to register in another state for having committed a sex offense in that state regardless of the date of the offense or its adjudication. [I.C., § 18-8403, as added by 1998, ch. 412, p. 1298.]

18-8404. Juvenile sex offender registry. — The Idaho state police shall establish and maintain within the central sex offender registry a separate registry of juvenile sex offenders. The registry shall include fingerprints, photographs, and information collected from submitted forms and other communications relating to notice of duty to register, sex offender registration, and notice of address change. Information in the registry of juvenile sex offenders is subject to release to criminal justice agencies pursuant to section 18-8305, Idaho Code, and to the public pursuant to section 18-8323, Idaho Code. [I.C., § 18-8404, as added by 1998, ch. 412, p. 1298; am. 2000, ch. 469, § 32, p. 1450.]

Compiler's notes. Section 31 of S.L. 2000, ch. 469 is compiled as § 18-8315.

18-8405. Notification of duty to register — Probation. — With respect to a juvenile sex offender sentenced to probation without a period of detention, the court shall provide at the time of sentencing written notification of the duty to register. The written notification shall be a form provided by the Idaho state police and shall be signed by the juvenile and the parents or guardian of the juvenile. One (1) copy shall be retained by the court, one (1) copy shall be provided to the offender, and one (1) copy shall be submitted within three (3) working days to the central registry. [I.C., § 18-8405, as added by 1998, ch. 412, p. 1298; am. 2000, ch. 469, § 33, p. 1450.]

18-8406. Notification of duty to register — Prior to release. — With respect to a juvenile sex offender sentenced to a period of detention, the county shall provide, prior to release, written notification of the duty to register. With respect to a juvenile sex offender committed to the custody of the department of juvenile corrections, the department shall provide, prior to release, written notification of the duty to register. The written notification shall be a form provided by the Idaho state police and shall be signed by the juvenile and the parents or guardian of the juvenile. One (1) copy shall be retained by the department of juvenile corrections, one (1) copy shall be provided to the offender, and one (1) copy shall be submitted within three (3) working days to the central registry. [I.C., § 18-8406, as added by 1998, ch. 412, p. 1298; am. 2000, ch. 469, § 34, p. 1450.]

Compiler's notes. Section 35 of S.L. 2000, ch. 469 is compiled as § 18-8408.

18-8407. Annual registration. — A juvenile sex offender, other than one serving a period of detention or committed to the department of juvenile corrections, shall be subject to annual registration and change of name or address notification pursuant to sections 18-8307 and 18-8309, Idaho Code.

All written notifications of duty to register as provided herein shall include a warning that it is a felony punishable as provided in section 18-8414, Idaho Code, for a juvenile sex offender to accept employment in any day care center, group day care facility or family day care home, as those terms are defined in chapter 11, title 39, Idaho Code, or to be upon or to remain on the premises of a day care center, group day care facility or family day care home while children are present, other than to drop off or pick up the juvenile sex offender's child or children. [I.C., § 18-8407, as added by 1998, ch. 412, p. 1298; am. 2004, ch. 270, § 5, p. 752.]

Compiler's notes. Sections 4 and 6 of S.L. 2004, ch. 270 are compiled as §§ 18-8307 and 18-8328, respectively.

18-8408. Providing list to superintendent of public instruction.

— The Idaho state police shall provide to the superintendent of public instruction, quarterly and on request, a list of registered juvenile sex offenders in the state. The superintendent of public instruction subsequently shall notify a school district or private school regarding the enrollment of a registered juvenile sex offender. The superintendent shall also notify the district or school of the offender's probationary status or treatment status, if known. [I.C., § 18-8408, as added by 1998, ch. 412, p. 1298; am. 2000, ch. 469, § 35, p. 1450.]

Compiler's notes. Sections 34 and 36 of S.L. 2000, ch. 469 are compiled as §§ 18-8406 and 19-5102, respectively.

18-8409. Failure to register, penalties. — (1) A juvenile sex offender who fails to register or provide notification of a change of name or address is guilty of a misdemeanor.

(2) A parent or guardian of a juvenile sex offender commits the misdemeanor offense of failure to supervise a child if the offender fails to register or provide notification of a change of name or address as required by this section. A person convicted of this offense is subject to a fine of not more than one thousand dollars (\$1,000). [I.C., § 18-8409, as added by 1998, ch. 412, p. 1298.]

18-8410. Transfer to adult registry. — When a registered juvenile sex offender reaches twenty-one (21) years of age, the prosecutor may petition the court to transfer the offender to the adult registry, subject to the registration and notification provisions of chapter 83, title 18, Idaho Code. If the court determines at a hearing that the juvenile sex offender is likely to pose a threat to the safety of others, the court shall order that the delinquent act be deemed an adult criminal conviction for the purpose of registration, notification, and public information access pursuant to chapter 83, title 18, Idaho Code. If no petition is filed, or if the court determines the juvenile is not likely to pose a threat to the safety of others, the juvenile shall be deleted from the registry. [I.C., § 18-8410, as added by 1998, ch. 412, p. 1298.]

18-8411. Juveniles convicted as adults. — The provisions of this section do not apply to a juvenile who is subject to registration and notification requirements of chapter 83, title 18, Idaho Code, because the offender was convicted of a sex offense as an adult. [I.C., § 18-8411, as added by 1998, ch. 412, p. 1298.]

18-8412. Exemption from civil liability. — (1) No person or governmental entity, other than those specifically charged in this chapter with a duty to collect information under this chapter regarding registered sex offenders, has a duty to inquire, investigate or disclose any information regarding registered sex offenders.

(2) No person or governmental entity, other than those specifically charged in this chapter with an affirmative duty to provide public access to information regarding registered sex offenders, shall be held liable for any failure to disclose any information regarding registered sex offenders to any other person or entity.

(3) Every person or governmental entity who, acting without malice or criminal intent, obtains or disseminates information under this chapter shall be immune from civil liability for any damages claimed as a result of such disclosures made or received. [I.C., § 18-8412, as added by 1998, ch. 412, p. 1298.]

18-8413. Penalties for vigilantism or other misuse of information obtained under this chapter. — Any person who uses information obtained pursuant to this chapter to commit a crime or to cause physical harm to any person or damage to property shall be guilty of a misdemeanor and, in addition to any other punishment, shall be subject to imprisonment in the county jail for a period not to exceed one (1) year, or by a fine not to exceed one thousand dollars (\$1,000) or both. [I.C., § 18-8413, as added by 1998, ch. 412, p. 1298.]

18-8414. Juvenile sex offender — Prohibited employment. — (1) Except as provided in section 18-8328, Idaho Code, it is a felony for any person to: apply for or to accept employment at a day care center, group day care facility or family day care home; or to be upon or to remain on the premises of a day care center, group day care facility or family day care home while children are present, other than to drop off or pick up the person's child or children if the person is currently registered or is required to register under the juvenile sex offender registration act as provided in chapter 84, title 18, Idaho Code.

(2) The owner or operator of any day care center, group day care facility or family day care home who knowingly employs a person or who knowingly accepts volunteer services from a person, which person is currently registered or is required to register under the juvenile sex offender registration act as provided in chapter 84, title 18, Idaho Code, to work in the day care center, group day care facility or family day care home is guilty of a misdemeanor unless judicial relief has been granted pursuant to section 18-8328, Idaho Code. [I.C., § 18-8414, as added by 2004, ch. 270, § 2, p. 752.]

Compiler's notes. Sections 1 and 3 of S.L. 2004, ch. 270 are compiled as §§ 18-8327 and 20-505, respectively.

Sec. to sec. ref. This section is referred to in §§ 18-8328, 18-8407 and 20-505.

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Distributors.

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Dwelling.

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Electronic communications system.

Communications security, §18-6701.

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Communication security, §18-6713.

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Communications security, §18-6701.

Emancipated.

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Enters.

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Children and lunatics, §18-1507.

Every person.

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False pretenses and cheats,
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First trimester of pregnancy.

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Forest land.

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Full enjoyment of.

Civil rights, §18-7302.

Government.

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Governmental military force.

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Handgun.

Prohibition of possession of certain
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Harm.

Bribery and corrupt influence,
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Harmful to minors.

Obscene materials, §18-1514.

Hazing.

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Abortion and contraceptives, §18-604.

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Ignition interlock device.

Breath alcohol analysis, §18-8008.

Illegal telecommunications equipment.

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Incarceration.

Sexual offender registration
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Informed consent.

Abortion, §18-604.

Infraction.

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Inhabited.

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Inhalant.

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18-6713.

Intimate areas.

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Intimate part.

Sexual exploitation by medical care
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Inventory.

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Inventory loading.

Pyramid schemes, §18-3101.

Investigative or law enforcement officer.

Communications security, §18-6701.

Issuer.

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Joint venture.

Prostitution, §18-5606.

Judge of competent jurisdiction.

Communications security, §18-6701.

Juvenile sex offender, §18-8403.**Knowingly.**

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Indecency and obscenity, §§18-1514, 18-4101.

Law enforcement agency.

Kidnapping, §18-4508.

Terrorist control, §18-8102.

Legal telecommunications equipment.

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Male rape, §18-6108.**Malice and maliciously.**

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Children and lunatics, §18-1507.

Material.

Obscene materials, §§18-1514, 18-4101.

Material support or resources.

Terrorism, §18-8106.

Matter.

Indecency and obscenity, §18-4101.

Mayhem, §18-5001.**Medical care provider.**

Sexual exploitation by medical care provider, §18-919.

Medical device.

Unused merchandise ownership protection, §18-2418.

Medical emergency, §18-609A.**Merchant.**

Theft of bank card information, §18-2415.

Minor, §18-609A.

Body piercing, branding or tattooing of minors, §18-1523.

Carrying concealed firearms on school property, §18-3302D.

Obscene materials.

Children and lunatics, §18-1514.

Misdemeanor, §18-111.

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Missing child.

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Mobile identification number.

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Civil rights, §18-7302.

Neglect.

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Neglect, negligence, negligent and negligently.

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Nonconsensual contact.

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Oath.

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Obscene, §18-4101.**Obscene live conduct, §18-4101.****Obtain.**

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Obtains or exerts control.

Theft, §18-2402.

Offender.

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Offense.

Bribery and corrupt influence, §18-1353.

Sexual offender registration notification and community right-to-know, §18-8303.

Official compendium.

Unused merchandise ownership protection, §18-2418.

Official proceeding.

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Open market.

Unused merchandise ownership protection, §18-2417.

Oral communication.

Communications security, §18-6701.

Out-of-state prisoner, §18-101A.**Owner.**

Tape piracy, §18-7602.

Theft, §18-2402.

Parent, §18-609A.**Partial-birth abortion, §18-613.****Participant.**

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Party official.

Bribery and corrupt influence, §18-1351.

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Pecuniary benefit.

Bribery and corrupt influence,
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Pen register.

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Performance.

Obscene materials.

Children and lunatics, §18-1514.

Perjury, §18-5401.**Person.**

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Communications security, §18-6701.

Crimes and punishments, §18-101.

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Tape piracy, §18-7602.

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Personal identification code.

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Personal identifying information.

False pretenses and escheats,
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Personal property.

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Physician.

Abortion and contraceptives, §18-604.

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Abortion, §18-614.

Possess.

Communication security, §18-6713.

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property, §18-3302D.

Precursor.

Chemical weapon, §18-3324.

Predatory.

Sexual offender registration
notification and community
right-to-know, §18-8303.

Principals.

Crimes and punishments, §18-204.

Prisoner, §18-101A.**Private correctional facility,
§18-101A.****Private prison contractor, §18-101A.****Private prison facility, §18-101A.****DEFINED TERMS —Cont'd****Promote.**

Obscene materials, §18-1514.

Pyramid schemes, §18-3101.

Property.

Computer crime, §18-2201.

Theft, §18-2402.

Prosecuting attorney.

Communications security, §18-6719.

Prurient interest.

Indecency and obscenity, §18-4101.

Psychosexual evaluation.

Sexual offender registration
notification and community
right-to-know, §18-8303.

Public moneys.

Public funds and securities,
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Prostitution, §18-5613.

Public servant.

Bribery and corrupt influence,
§18-1351.

Publish.

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**Pyramid promotional scheme,
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Real property.

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Recidivist.

Sexual offender registration
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right-to-know, §18-8303.

Reckless conduct.

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Reencoder.

Theft of bank card information,
§18-2415.

Residence.

Sexual offender registration
notification and community
right-to-know, §18-8303.

Revoked financial transaction card.

False pretenses and cheats,
§18-3122.

Riot, §18-6401.**Robbery, §18-6501.**

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Kidnapping, §18-4508.

Sadomasochism.

Children and lunatics, §18-1507.

Sado-masochistic abuse.

Obscene materials, §18-1514.

Scanning device.

Theft of bank card information,
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School.

Possessing weapons or firearms on
school property, §18-3302D.

Search and rescue dog, §18-7039.**Second trimester of pregnancy.**

Abortion and contraceptives, §18-604.

Sell.

Video voyeurism, §18-6609.

Services.

Computer crime, §18-2201.

Theft, §18-2402.

Sexual conduct.

Children and lunatics, §18-1514.

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Sexual contact.

Children and lunatics, §§18-1506,
18-1508A.

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Sexual exploitation by medical care
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Sexual excitement.

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Sexual exploitative material.

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Sexual intercourse.

Children and lunatics, §18-1507.

Shrapnel, §18-3318.**Solicit.**

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Solicitation, §18-2001.**Special influence.**

Bribery and corrupt influence,
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State correctional facility, §18-101A.**State registrar.**

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Sterile area.

Airport security, §18-7503.

Stolen property.

Theft, §18-2402.

Structure.

Arson, §18-801.

DEFINED TERMS —Cont'd**Student.**

Sexual offender registration
notification and community
right-to-know, §18-8303.

Tattoo.

Body piercing, branding or tattooing
of minors, §18-1523.

Telecommunication line.

Telephones and telegraphs, §18-6810.

Telecommunications services.

Communications security, §18-6713.

Telephone.

Use of telephone to annoy, terrify,
threaten, etc., §§18-6710,
18-6711.

Terrorism.

Terrorist control, §18-8102.

Theatre.

Motion picture fair bidding,
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Third trimester of pregnancy.

Abortion and contraceptives, §18-604.

Touching.

Sexual exploitation by medical care
provider, §18-919.

Toxic chemical.

Chemical weapon, §18-3324.

Toxin.

Biological weapons, §18-3323.

Tracking dog, §18-7039.**Track motor cars.**

Forgery and counterfeiting, §18-3617.

Trade screening.

Motion picture fair bidding,
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Traumatic injury.

Domestic violence, §18-918.

Unlawful assembly, §18-6404.**Unused merchandise, §18-2417.****User.**

Communications security, §18-6701.

**Vaginally delivers a living fetus
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Partial-birth abortion, §18-613.

Value.

Theft, §18-2402.

Vector.

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Violent sexual predator.

Sexual offender registration
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right-to-know, §18-8303.

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Wire communication.

Communications security, §18-6701.

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Requirements of label, §18-5502.

Misdemeanors.

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Motor vehicles.

Use of denatured alcohol for anti-freeze purposes, §18-5502.

Sales.

Regulation of sale and transfer, §18-5502.

Transfer.

Regulation of sale and transfer, §18-5502.

Violations.

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Accomplishing rape by use of anaesthetics, §18-6101.

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- Use of fraudulent scales for ore, §18-7206.

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- Scales.
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Scales.

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